Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MICHAEL MAURINO,

Petitioner,

vs.

RICHARD JOHNSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 6TH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Michael Maurino was charged with and convicted of second degree murder and possession of a firearm during a felony involving the death of his girlfriend, Vicki Lee. His defense was that the gun went off by accident. Habeas Corpus was denied by the United States District Court, and that was affirmed by the Sixth Circuit Court of Appeals by a 2 to 1 vote in a published opinion. The questions presented are:

QUESTION 1: WHETHER, IN A HOMICIDE CASE WITH A DEFENSE OF ACCIDENT, THE TRIAL PROSECUTOR IMPROPERLY ACTED AS A WITNESS, DEPRIVING PETITIONER OF HIS CONSTITUTIONAL RIGHT TO CONFRONTATION, BY ASSERTING WITHOUT EVIDENCE THAT PETITIONER TOLD A WAITRESS HE INTENDED TO KILL THE DECEASED.

QUESTION 2: WHETHER THE 6TH CIRCUIT, IN ITS PUBLISHED RULING IN THIS CASE, ABANDONED THE PRINCIPLES ANNOUNCED IN CASES SUCH AS *O'NEAL V. MCANINCH*, 513 U.S. 432 (1995) AND *SULLIVAN V. LOUISIANA*, 508 U.S. 275 (1993) FOR DETERMINING WHETHER ERROR IS HARMLESS, BY ACTING AS AN APPELLATE JURY RATHER THAN AN APPELLATE COURT.

QUESTION 3: WHETHER THE EGREGIOUS NATURE OF THE PROSECUTOR MISCONDUCT, FOUND BY ALL 3 JUDGES OF THE 6TH CIRCUIT TO EXIST HERE, REQUIRES REVERSAL UNDER *BRECHT V. ABRAHAMSON*, 507 U.S. 619 (1993).

QUESTION 4: WHETHER THE PREMEDITATED, INTENTIONAL NATURE OF THE PROSECUTOR MISCONDUCT AFFECTS PETITIONER'S RIGHT TO HABEAS CORPUS RELIEF.

QUESTION 5: WHETHER THE COMPLETE DEFERENCE TO THE STATE COURT RULING OF HARMLESS ERROR WAS IMPROPER UNDER *WILLIAMS V. TAYLOR*, 120 S.CT 1495 (2000), BECAUSE IT FOCUSED ONLY ON THE EVIDENCE AGAINST PETITIONER, AND IGNORED THE EVIDENCE IN HIS FAVOR.

QUESTION 6: WHETHER FALSELY INFORMING THE JURY OF A THREAT BY THE PETITIONER TO KILL THE DECEASED IS HARMLESS MERELY BECAUSE THE CRIME CHARGED IS SECOND DEGREE MURDER RATHER THAN FIRST DEGREE MURDER.

QUESTION 7: WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE BIAS OF THE TRIAL JUDGE AGAINST DEFENSE COUNSEL.

QUESTION 8: WHETHER TRIAL COUNSEL WAS INEFFECTIVE, WHERE HE FAILED TO CALL AN AVAILABLE WITNESS TO REBUT THE PROSECUTOR'S SUGGESTIONS THAT PETITIONER WAS THE ONE WHO CAUSED BRUISES TO THE DECEASED.

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MICHAEL MAURINO, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the 6th Circuit Court of Appeals issued April 24, 2000, with rehearing and rehearing en banc denied June 1, 2000.

OPINIONS BELOW

The following opinions below are attached in the Appendix: published opinion of the Sixth Circuit on April 24, 2000; United States District Court opinion denying Habeas Corpus of February 18, 1998; Michigan Court of Appeals ruling of June 27, 1989; Trial court opinion denying Motion for Relief from Judgment of March 18, 1993.

STATEMENT OF JURISDICTION.

This case began as a Petition for Habeas Corpus complaining of a criminal prosecution in the Recorders Court for Wayne County, Michigan. The original criminal judgment was entered December 4, 1987. The judgment denying Habeas Corpus was issued by the United States District Court February 18, 1998. The ruling of the Sixth Circuit Court of Appeals was issued April 24, 2000, with rehearing denied June 1, 2000. This Court has jurisdiction under 28 U.S.C. §1254 to review the final judgment of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Petitioner Michael Maurino was tried and convicted of second degree murder and felony firearm in a jury trial in Wayne County, Michigan Recorders Court before Judge Joseph A. Gillis. On December 4, 1987, Judge Gillis sentenced Petitioner to prison for 25 to 50 years plus 2 years.

The Michigan Court of Appeals affirmed June 27, 1989. Case No. 106298. The Michigan Supreme Court denied leave to appeal February 26, 1990. Case No. 86456. A Motion for Relief from Judgment was denied on the merits March 19, 1993, by Judge Gershwin Drain. The Court of Appeals denied leave to appeal on July 21, 1994. Case No. 172794. The Michigan Supreme Court denied leave to appeal on March 31, 1995. Case No. 167190.

A Petition for Habeas Corpus was filed in United States District Court pursuant to 28 U.S.C. §2254. On February 18, 1998, United States District Judge Lawrence P. Zatkoff denied the Petition for Habeas Corpus. The Sixth Circuit Court of Appeals, by a 2 to 1 vote, affirmed April 24, 2000. The Sixth Circuit denied rehearing June 1, 2000.

FACTS CONCERNING THE TRIAL

The conviction concerned the death of Petitioner's girlfriend, Vicki Lee. She died from a single bullet wound to the left side of her nose. (T I, 128).

Hospital security guard James Herring testified that Petitioner carried the injured Ms. Lee into the hospital, begging them to save her, and stating that "I didn't mean to shoot her." (T III, 431-438).

John Stanton of the Michigan State Police crime lab testified that the safety on the gun was broken, and that smashing this gun against the windshield of the car could cause it to go off accidentally. (T I, 166; T I, 175-179).

Off. John Lazar testified that there was a spent casing and blood inside the car (T II, 242; T II, 244; T II, 256-257), and that there were cracks in the windshield from a blow from the inside. (T II, 264).

Petitioner testified that the gun went off accidentally inside the car when he hit the gun against the windshield, and he did not even know it was loaded. (T IV, 482-483).

During the cross-examination of Petitioner by prosecutor Maria Petito, the following occurred (T IV, 513-515; R. 1, Apx. 68-70):

"Q In fact, you had been in the bar at an earlier -- earlier times, when she was a waitress, isn't that right?

A Yes, I did.

Q Did you ever deliver a bullet to her?

A A what?

Q A bullet?

A No.

Q **Didn't you in fact deliver a bullet to one of the waitresses, and say to her that "This one's for Vicki," several -- just a few months before this?**

A No.

Q And if someone came in, and testified to that effect, that --

MR. STRAUSS: (Interposing) I'd object, this is improper cross-examination.

THE WITNESS: They'd be lying, because I've never done anything like that

MR. STRAUSS: I'll withdraw the objection.

MS. PETITO: Okay.

CROSS-EXAMINATION CONTINUED

BY MS. PETITO

Q Now let's -- you in fact --

A (Interposing) Can I ask you something? How come you insinuate something like this, that is an out-and-out lie?

MS. PETITO: Well, your Honor--

...

MR. STRAUSS: Your Honor, I have a motion. I ask that you hold the prosecuting attorney in contempt of court for this comment. She just rested her case this afternoon. And, if she had some competent evidence that my client had sent a bullet, by a waitress, just a couple months before this death, here, to this Vicki, while she was working, then she should have presented in in her case-in-chief.

THE COURT: Now --

MR. STRAUSS: (Interposing) And I object, and move that it be stricken, and move for a mistrial. And you can deny them all, if you want, but they are on the record.

THE COURT: Anything the lawyers say is not evidence, either what Mr. Strauss said, or Ms. Petito. Let's proceed with the case. Motions are denied."

At no point in the trial did the prosecution call any witness to support her assertion that Petitioner has threatened to kill the accused.

During the trial the judge frequently criticized defense counsel, suggested more than once that Petitioner should fire him, held him in contempt, and called him a jerk and incompetent.

There were some bruises on the body of the deceased on her wrists, forearms and jaw. (T II, 288). It was the position of the prosecutor that Petitioner Maurino caused those bruises. (T I, 86; T V, 580-582).

Petitioner testified that he never laid a hand on Vicki (T IV, 550) and that he did not cause the bruises. (T IV, 551). The prosecutor returned to the bruise theory in her closing (T V, 580-581):

> "I want you to remember the bruises, the bruises to her wrists, the bruises to her arms and the one that was to her chin."

Michael Dale Williams informed defense counsel that earlier on the day of the shooting, on August 7, 1987, he and his cousin Charlene Hubbard were wrestling with Vicki, and Vicki complained that this caused her bruises. (Per Affidavit submitted to all state and federal courts). Counsel did not call Williams as a witness.

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER, IN A HOMICIDE CASE WITH A DEFENSE OF ACCIDENT, THE TRIAL PROSECUTOR IMPROPERLY ACTED AS A WITNESS, DEPRIVING PETITIONER OF HIS CONSTITUTIONAL RIGHT TO CONFRONTATION, BY ASSERTING WITHOUT EVIDENCE THAT PETITIONER TOLD A WAITRESS HE INTENDED TO KILL THE DECEASED.

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QUESTION 5: WHETHER THE COMPLETE DEFERENCE TO THE STATE COURT RULING OF HARMLESS ERROR WAS IMPROPER UNDER *WILLIAMS V. TAYLOR*, 120 S.CT 1495 (2000), BECAUSE IT FOCUSED ONLY ON THE EVIDENCE AGAINST PETITIONER, AND IGNORED THE EVIDENCE IN HIS FAVOR.

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Certiorari should be granted to encourage lower courts to follow the standards set by this Court to determine harmless error. As the dissenting judge in the Sixth Circuit noted, the panel majority disregarded ample authority from this Court and from the Sixth Circuit itself in finding harmless error. The fact that the opinion is for publication demonstrates that a wrong ruling here has considerable propensity for mischief-making and leading courts to improper results.

The Sixth Circuit's establishment of the new standard in this case, just months after establishing a different standard in *Barker v. Yukins*, 199 F.3d 867 (6th

Cir. 1999), makes uniformity impossible, and has directly led to unjust results for Petitioner Michael Maurino who, in the words of the majority opinion, suffered "egregious prosecutorial misconduct." (Apx. A24).

The fact that the Sixth Circuit now has 2 conflicting standards for determining harmless error means that judges in that Circuit may now arbitrarily employ one standard rather than another, depending on whether they want the petitioner to win or to lose. Petitioner submits that a single standard is needed, and that the standard, once set, should be followed as uniformly as humanly possible.

The real question is whether, in a non-overwhelming case, the right of confrontation can be dispensed with because of judicial theorizing that the Petitioner "handled well" the prosecutor's non-evidentiary assertions, because he denied them. Can the prosecutor be allowed to inform the jury there is a witness that says the Petitioner is lying, and then not call or try to call the witness?

The factual issues in the trial were clear. Either the gun went off accidentally, as the Petitioner testified, or the gun was fired intentionally, as the prosecutor theorized. The amount of evidence supporting the defense of accident was substantial:

- Petitioner testified that the gun went off accidentally inside the car when he

hit the gun against the windshield, and he did not even know it was loaded. He immediately rushed Vicki to the hospital because there was no intent to shoot her. (T IV, 481-483).

- Hospital security guard James Herring testified that Petitioner rushed the injured but still living Ms. Lee into the hospital, begging them to save her, and stating that "I didn't mean to shoot her." (T III, 431-438).
- John Stanton of the Michigan State Police crime lab testified that the safety on the gun was broken, and that smashing this gun against the windshield of the car could cause it to go off accidentally. (T I, 166, 175-179).
- Off. John Lazar testified that there was a spent casing and blood inside the car (T II, 242, 244, 256-257), and that there were cracks in the windshield from a blow from the inside. (T II, 264).

The prosecutor countered this defense, not with evidence, but with unconstitutional assertion of purported "facts" to the jury. The prosecutor informed the jury, without any evidence, that prior to the shooting, Petitioner had gone to the bar where Vicki worked,

handed a bullet to a waitress, and said "This one's for Vicki." With this piece of information, the jury rejected accident and convicted Petitioner of the crime charged, second degree murder. However, the information was not evidence, as it was presented to the jury solely by prosecutor assertion, not by actual testimony. The prosecutor did not even attempt to put on any such testimony. Witnesses that worked at the bar were called, but none ever testified that Defendant made a threat on Vicki's life or did anything with a gun or bullet.

Petitioner submits that in a prosecution for murder, where the defense is accident, information submitted to the jury that the defendant had threatened to kill the deceased is of extreme relevance and probative value. Numerous cases hold in a homicide case that evidence of a prior threat to kill the deceased was highly relevant and important toward proving intent or lack of accident, and are highly important to a jury in determining guilt:

- *People v. Melvin*, 70 Mich. App. 138 (1976).
- *People v. Miller*, 211 Mich. App. 30, 38-39 (1995).
- *People v. Johnson*, 93 Mich. App. 667 (1980).
- *People v. Paintman*, 92 Mich. App. 412, 420 (1979), rev'd. on other grounds 412 Mich. 518 (1982).

- *People v. Freeman*, 32 Mich. App. 321, 323 (1971).

In *People v. Melvin*, 70 Mich. App. 138 (1976), the defendant was on trial for murder, and raised a defense of accident. The prosecution was permitted to introduce a letter where the defendant made a threat against the victim some 2 years before the killing. The Michigan Court of Appeals ruled:

> "Since the defendant admitted shooting his wife but testified that the killing was accidental, **the importance of the letter to the prosecution's case is obvious.** The defense repeatedly objected to its admission--during both the trial and the preliminary examination. We believe that the letter was properly admitted. Given the importance of this single piece of evidence, each of the defendant's grounds for opposing its admission will be discussed separately."

If the Petitioner threatened to kill Vicki, then jurors could reasonably conclude that he intended to do what he threatened to do. The false "evidence" of a threat to kill "is the kind of evidence that has a direct and rational connection between it and an adverse verdict," therefore requiring Habeas Corpus relief. *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999). The unconstitutional providing of "information" to the jury in this case was far, far more

egregious than that in *Nevers*, because it dealt, not with unrelated bad acts, but with acts and intentions towards this very decedent, acts that would be highly relevant and admissible through a witness if true. The panel's stated reliance on *Nevers*, concurrent with the direct defiance of *Nevers*, was unreasonable and unjust.

In a habeas corpus case alleging constitutional trial error (as opposed to structural error), the standard for review is whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619; 113 S.Ct. 1710; 123 L.Ed.2d 353, 373 (1993).

In a homicide case, we submit it is clearly unreasonable to hold that "evidence" of a threat to kill the deceased by the defendant, where that is the only "evidence" of such a threat, would not have a substantial and injurious effect on a jury. We submit it is unreasonable to hold that "evidence" of a threat to kill could have no effect on the jury, where there was in fact substantial evidence of an accidental shooting, which the jury would necessarily reject upon hearing of the threat.

The panel judges did not find that no reasonable juror could believe the claim of accident. Therefore, how can it be said that false "evidence" disproving accident could not affect the verdict?

The fact that accident is a defense to both first degree murder and second degree murder makes

unreasonable the panel's reliance on the second degree verdict as making the error harmless.

The Sixth Circuit ruling (Apx. A23-A24) was essentially that because the jury might have found that the shooting was intentional and not accidental, the prosecutor's action in putting her thumb on the scales, adding to her side of the case false evidence that did not actually exist, did not affect the weight of her case.

This ruling thereby violated the standard of *O'Neal v. McAninch*, 513 U.S. 432 (1995):

> "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict," that error is not harmless. And, the petitioner must win."

Here, as in *O'Neal v. McAninch*, "we are dealing here with an error of constitutional dimension - the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person." A trial is unreliable where any important but unreliable piece of information, not cumulative, is used to discredit the defense. Where, as here, the important but unreliable piece of information deals with the most important issue in the case, the conclusion of unreliability of verdict is even clearer. How could the jury reliably determine whether Maurino intentionally shot or accidentally shot, when false,

noncumulative evidence of intention to shoot is presented to them? How could they properly determine whether Petitioner's testimony was truthful?

If the alleged threat to kill was so unimportant, why did the trial prosecutor feel so compelled to bring it to the attention of the jury that she was willing to do it without a witness? The prosecutor did not even attempt to call a witness to support the made-up claim of a threat to kill. Even the panel ruled that "a strong argument can be made that the information was deliberately placed before the jurors in an attempt to mislead them." (Apx. A22). The blatant, intentional nature of the violation is supposed to be a significant factor, *Angel v. Overburg*, 682 F.2d 605 (6th Cir. 1982), but the majority of the panel refused even to discuss this claim.

The Sixth Circuit ruling also conflicts with the ruling of the United States Supreme Court in *Sullivan v. Louisiana*, 508 U.S. 275 (1993): "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal." Here, the 2 judge majority essentially acted as jurors, determining whether they would still convict Petitioner despite this information. This was the same error described in *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999):

> "As the Supreme Court has recognized, the Sixth Amendment protects the

> defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993). This right is further interpreted as prohibiting judges from weighing evidence and making credibility determinations, leaving these functions for the jury."

The judges on this panel violated that rule. They looked to the existence of evidence of guilt, and finding some, that ended their analysis. They should have looked, instead, to whether a reasonable person acting as juror, not trained in the law, would be influenced by evidence that the defendant claiming accident had threatened to kill. This is so obviously harmful that it is unreasonable to hold otherwise, as Judge Holschuh concluded in dissent.

In *Barker v. Yukins*, supra, the Court noted that they could not tell in any case exactly what was the thinking process of the jurors who rejected the defense, however, if the record gave them the latitude to find guilt on a false basis, that is enough to show "grave doubt" sufficient to require Habeas Corpus relief.

Here, as in *Barker v. Yukins*, "it is apparent" that the reviewing court's "determination that the [error] was harmless necessarily means that the court believed some evidence but discredited other evidence." These judges

did the same thing. In the Opinion (Apx. A23-A24), they point to evidence suggesting it was not an accident, and speak of "sufficient evidence of intent." Petitioner did not raise a claim of insufficient evidence. To deny this issue because the evidence was sufficient to convict is the same error that the state courts made in *Barker v. Yukins*, and should not be upheld here. "It is neither the proper role for a state supreme court, nor for this Court, to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others."

Compare also to *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000), where a different panel of the same court granted Habeas Corpus relief for prosecutor misconduct considerably less egregious than in this case.

The Sixth Circuit ruling violated the standard of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). In *Donnelly*, the Court denied relief because "This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights...When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."

Here, unlike in *Donnelly v. DeChristoforo*, there was a violation of a specific guarantee of the Bill of Rights: the right to confront the witnesses against you. U.S. Const., Amend. VI; *Berger v. United States*, 295 U.S. 78 (1935); *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976);

United States ex rel Shaw v. DeRobertis, 755 F.2d 1279 (7th Cir. 1985). In fact, the United States Supreme Court holds that the right of a defendant to cross-examine the witnesses against him is recognized under the U.S. Constitution as being among the most fundamental of rights. *Davis v. Alaska*, 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974); *Lee v. Illinois*, 476 U.S. 530; 106 S.Ct. 2056; 90 L.Ed.2d 514 (1986).

Obviously, no special care has been taken here to assure no prejudice to the Petitioner, either by the trial court, or by the Sixth Circuit Court of Appeals. That is clear by the fact that the panel refused to grant relief, even though they found (Apx. A22):

> "Because there were no witnesses to the shooting other than the decedent and the petitioner, the jury's decision turned on whether it found the petitioner's testimony to be credible. By insinuating that the petitioner had threatened the decedent on a prior occasion, the prosecutor called into question the defendant's testimony about his relationship with the decedent."

Prosecutor Petito told the jury about what an unnamed waitress supposedly said, and Petitioner was powerless to cross-examine either Petito or the waitress about it. The prosecutor destroyed the Defendant's credibility and added enormously to the case against

him, not by referring to testimony in the case, but by making up facts and asserting them to be true, and pitting her credibility against that of the Petitioner.

Here, as in *United States ex rel Shaw v. DeRobertis*, 755 F.2d at 1281, "The prosecutor violated the fundamental rule, known to every attorney, that argument is limited to the facts in evidence."

It is manifestly unjust to convict Petitioner of a crime on the suggestion of facts not supported by the evidence. As the Supreme Court explained in *Berger*, a lawyer representing the government is more than just a lawyer; she is a representative of the sovereign, **"Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."**

It is atrocious and unreasonable to hold, as did the panel in this case, that without an affidavit from jurors as to how the evidence affected them, Petitioner has no right to complain of the violation of the confrontation clause. (Apx. A23). It is the courts that are supposed to protect the constitutional rights, whether the Petitioner has gained the support of jurors or not. Constitutional rights are to be upheld for the unpopular as well as for the popular. The Court in *Berger* did not require juror affidavits to reverse for this type of error, nor has any other United States Supreme Court decision.

The standard of *Darden v. Wainwright*, 447 U.S. 168 (1986) was also violated. The Court in *Darden* found no harmful constitutional violation because "The prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." Here, the prosecutor's argument not only misstated the evidence, it made up the evidence.

In *Berger v. United States*, the prosecutor informed the jury, in the guise of a question, what the prosecutor was allegedly told by someone outside of court. The Supreme Court had no trouble reversing this conviction, finding that the prosecutor "was guilty ... of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered." 79 L Ed at 1319.

In rejecting the issue, the Sixth Circuit used a definition of "reasonableness" that amounted to complete deference to whatever the state court did, contrary to *Williams v. Taylor*, 120 S.Ct. 1485 (2000), decided shortly after this Sixth Circuit ruling. In *Williams v. Taylor*, this Court found that the state court's finding of no prejudice was unreasonable because the state court focused only on the evidence against the accused, instead of including the evidence in his favor. The analysis that this Court found unreasonable in *Williams v. Taylor* is similar to that employed by the state courts and the Sixth Circuit in this case. The Sixth Circuit ruling discussing prejudice (Apx.

A21-A24) mentions only the evidence against Petitioner Maurino, and utterly ignores the large body of evidence in his favor tending to show accident, that the unconstitutional "evidence" was designed to overcome, and did overcome.

As Justice O'Connor stated, speaking for the *Williams* Court in Section II:

> "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision "involv[ing] an unreasonable application of ... clearly established Federal law."

We submit that in a prosecution for murder, where the defense is accident, information submitted to the jury that the defendant had threatened to kill the deceased is of extreme relevance and probative value. Information of that nature could not help but have "a substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, supra, especially where, as here, it was not cumulative of other evidence in the case. In *People v. Melvin*, 70 Mich. App. 138 (1976), the Court held that the importance of this type of evidence was "obvious." A ruling to the contrary would be unreasonable.

As Judge Holschuh ruled in dissent (Apx. A31):

> "I cannot, however, see that the distinction between first degree murder and second degree murder is a sufficient basis for denial of relief in this case. A defendant's intent is a critical element of both crimes under Michigan law, and the prosecutorial misconduct involved proving that intent in an egregious manner and, at the same time, impugning the credibility of petitioner's own testimony about his intent. In my view, basic fairness, as well as the constitutional right to due process, prohibits such conduct and, regardless of the degree of the offense in question, such conduct cannot avoid having a substantial and injurious effect on the outcome of the trial."

This Court should grant certiorari and a new trial at which the prosecutor shall not provide facts to the jury under the guise of questioning, shall not argue facts to the jury which are not in evidence, shall not act as an unsworn witness, and at which the right of confrontation shall be protected. The prosecutor shall not assert before the jury the existence of witnesses that the prosecutor does not call. The prosecution shall not present critical facts to the jury in the guise of questioning, but shall instead use actual witnesses.

QUESTION 7: WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE BIAS OF THE TRIAL JUDGE AGAINST DEFENSE COUNSEL.

The record shows that the trial judge intensely disliked defense counsel, had squabbles with him, treated him unequally compared to the prosecutor, declared he could not count, called him a jerk, called him incompetent, and tried to persuade the Petitioner to fire him.

A defendant, or any litigant, has the right to have his case heard by a judge who is unbiased. U.S. Const., Amend. XIV; *In Re Murchison*, 349 U.S. 133; 75 S.Ct. 623; 99 L Ed 942 (1955); *Gardner v. A.H. Robins Co*, 747 F.2d 1180 (8th Cir. 1984).

In *United States v. Will*, 449 U.S. 200, 216; 101 S.Ct. 471; 66 L.Ed.2d 392 (1980), the Court stated:

> "If there is any reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case."

Would a reasonable person, hearing the judge call the defense counsel names like "incompetent" and "jerk," find a factual basis for doubting the judge's impartiality? We believe he would.

This case has strong similarity to *Offutt v. United States*, 348 U.S. 11; 75 S.Ct. 11 (1954). The Supreme Court

held the trial judge to be biased because of his becoming personally embroiled in clashes with defense counsel and his comments after the trial about "a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the legal profession."

The state court ruling finding no bias, no error, and no harm was unreasonable, therefore, the Sixth Circuit should not have deferred to it. The federal court is to defer only to factual rulings, not legal rulings or mixed questions of fact and law. *Cuyler v. Sullivan*, 446 U.S. 335; 100 S.Ct. 1708; 64 L.Ed.2d 333 (1980).

QUESTION 8: WHETHER TRIAL COUNSEL WAS INEFFECTIVE, WHERE HE FAILED TO CALL AN AVAILABLE WITNESS TO REBUT THE PROSECUTOR'S SUGGESTIONS THAT PETITIONER WAS THE ONE WHO CAUSED BRUISES TO THE DECEASED.

Michael Williams informed Petitioner's defense counsel that earlier on the day of the shooting, Williams, the deceased, and Charlene Hubbard were wrestling and that caused bruises to the deceased. This would have contradicted the prosecutor's argument that the bruises showed that Petitioner was a violent person who beat the deceased. Given the substantial amount of evidence that the shooting was in fact accidental (See Issue I), it is

reasonably probable that the absence of this witness affected the verdict.

Failure of defense counsel to adequately investigate or contact witnesses or present a defense constitutes ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); *Wilson v. Cowan*, 578 F.2d 166 (6th Cir. 1978); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *United States v. Porterfield*, 624 F.2d 122 (10th Cir. 1980); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978); *Sullivan v. Fairman*, 819 F.2d 1382, 1391-1392 (7th Cir. 1987).

Where there is substantial evidence of accident, and where the finding of no accident is based on a mistaken belief that the defendant beat up the deceased, this indeed undermines confidence in the outcome. The only evidence connecting Petitioner to the bruising is supposition, and that supposition could have been effectively countered with evidence.

The state court ruling finding no error and no harm was unreasonable, therefore, the District Court and Sixth Circuit should not have deferred to it. The federal court is to defer only to factual rulings, not legal rulings or mixed questions of fact and law. A finding of no ineffective assistance of counsel is the type of issue on which a federal court should not defer to state court. *Cuyler v. Sullivan*, 446 U.S. 335; 100 S.Ct. 1708; 64 L.Ed.2d 333 (1980).

The Sixth Circuit clearly erred by finding that Petitioner did not request an evidentiary hearing in state court. The issue was raised in the Motion filed in the trial court, and an evidentiary hearing was specifically requested, and denied. (Apx. A86).

The Sixth Circuit also erred by adopting suppositions about what was "defense counsel's belief." (Apx. A19). Without the evidentiary hearing, there was no basis on which to make a finding of what counsel believed.

As the Court held in *United States v. Baynes*, 687 F.2d 659, 666 (3rd Cir. 1982):

> "Although the decision whether or not to utilize a particular item of evidence may be a matter of trial strategy within the acceptable bounds of trial counsel's discretion, we believe the failure to investigate a critical source of potentially exculpatory evidence may present a case of constitutionally defective representation."

In *Landers v. Rees*, 782 F.2d 1042 (6th Cir. 1985), the Court stated "Counsel's failure to pursue a substantial defense, however, violates the defendant's constitutional right when the failure is a result of ineffectiveness or incompetence." In *Tucker v. Prelesnik*, 181 F.3d 747 (6th Cir. 1999), the Court found ineffective assistance of counsel and granted Habeas Corpus relief for failure to impeach a witness with medical records and prior

inconsistent statements. In *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997), the Court found ineffective assistance of counsel and granted Habeas Corpus relief for failure to call witnesses. In *Workman v. Tate*, 957 F.2d 1339 (6th Cir. 1992), the Court held that defense counsel's failure to contact or call as witnesses Wilkerson and Osborne was ineffective assistance of counsel justifying Habeas Corpus relief. See also *Harris v. Reed (On Remand)*, 894 F.2d 871 (7th Cir. 1990) [failure of an attorney to call two witness who saw the man running from the crime scene, and saw it was not defendant]; *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999) [failure to introduce evidence corroborating defense witness]. As the Court held in *Hart v. Gomez*:

> "A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance."

Here, as in *Lord v. Wood*, 184 F.3d 1097 (9th Cir. 1999), "trial counsel had at their fingertips information that could have undermined the prosecution's case, yet chose not to develop this evidence...Their performance therefore fell outside the wide range of professionally competent assistance that *Strickland* requires."

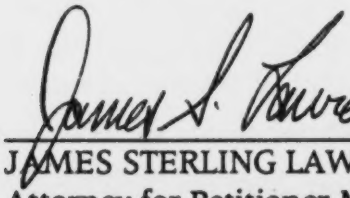
The District Court unfairly ruled on the basis that the affidavit of the witness was prepared after trial. (Apx. A62-A63). When else would such an affidavit be prepared?

There was no possibility of harm to Petitioner to having the jury know that the woman received bruises from other people, not Petitioner. This Court should grant certiorari and a new trial at which this critically important information can come before the jury.

CONCLUSION

Petitioner Michael Maurino respectfully submits that for the reasons stated above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,



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Dated: August 28, 2000

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHAEL MAURINO,

Petitioner-Appellant,

v. No. 98-1332

RICHARD JOHNSON, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 97-71622--Lawrence P. Zatkoff, Chief District Judge.

Argued: September 20, 1999

Decided and Filed: April 24, 2000

Before: KENNEDY and NORRIS, Circuit Judges;
HOLSCHUH(*), District Judge.

COUNSEL

ARGUED: James Sterling Lawrence, Detroit, Michigan,

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*The Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

for Appellant. Vincent J. Leone, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellee. **ON BRIEF**: James Sterling Lawrence, Detroit, Michigan, for Appellant. Vincent J. Leone, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellee.

KENNEDY, J., delivered the opinion of the court, in which NORRIS, J., joined. HOLSCHUH, D. J. (pp. 19-26), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KENNEDY, Circuit Judge. Petitioner, Michael J. Maurino, appeals the District Court's denial of his request for a writ of habeas corpus. Following a jury trial in the Detroit Recorder's Court, petitioner was found guilty of second-degree murder, M.C.L. § 750.317, M.S.A. § 28.549, and possession of a firearm during the commission of a felony, M.C.L. § 750.227b, M.S.A. § 28.424(2). He was sentenced to twenty-five to seventy-five years imprisonment for the murder conviction plus two years consecutive imprisonment for the felony-firearm conviction. Petitioner filed a motion for a New Trial and a Motion to Set Aside the Sentence and for Resentencing, which were denied. Petitioner, then appealed to the Michigan Court of Appeals, which affirmed his

conviction. The Supreme Court of Michigan denied petitioner's request for leave to appeal. He then filed a habeas petition in state court, which was denied, as were his subsequent state appeals. After exhausting his state remedies, petitioner filed a petition for a writ of habeas corpus in federal court. The district court denied this petition and the petitioner appealed. On appeal petitioner raises three issues: (1) whether petitioner was denied a fair trial due to the bias of the trial judge against defense counsel; (2) whether petitioner was denied the effective assistance of counsel where a critical defense witness was not called; and (3) whether the trial prosecutor improperly acted as a witness depriving petitioner of his constitutional right to confrontation, by asserting without evidence that petitioner told a waitress he intended to kill the victim. Because we find that reasonable jurists could find the state court's decision to be a reasonable application of Supreme Court law, we shall affirm.

I. Facts

On August 6, 1984, petitioner went to the Silver Cricket Lounge to see the victim, Vicki Lynn Lee. Prior to arriving at the lounge, petitioner consumed both cocaine and alcohol and while at the lounge, petitioner continued to consume alcohol. Petitioner and the victim left the lounge together around 2:00 a.m. Approximately a half hour after leaving the lounge, petitioner brought the victim to Westland Medical Center because she had been

shot. On September 2, 1984, the victim died from the gunshot wound. Petitioner conceded that he was with the victim when she was shot and that the gun in his possession was the weapon which discharged the bullet. Petitioner, however, contended that the incident was an accident and that he was not aware that the gun was loaded.

Petitioner made two verbal and one written statements to police about the incident. The first statement occurred at the hospital immediately following the shooting. Upon bringing the victim into the hospital, the petitioner told the security guard on duty that he had shot the victim and that it was an accident. The police were called and petitioner was given Miranda warnings. Petitioner admitted to shooting the victim and stated that the gun discharged after he had racked the gun. He said that he and the victim had been arguing and that he had exited the car. The victim followed him in the car as he walked and convinced him to get back inside the vehicle. They began arguing again and the petitioner hit the windshield three or four times. He then withdrew a handgun from his jacket and racked the gun, removed the clip and pointed the gun at her. He said to the victim, "You see how mad you make me? You see what you make me do? See what you can make me do?" At that point, the gun discharged.

He was arrested for investigation of a homicide and transported to the police station. At the police station, the

petitioner was interrogated. In response to questioning by the police, he gave a more detailed description of the events of the evening. Prior to giving this statement he again was advised of his Miranda rights. He also responded in the affirmative to an inquiry as to whether he was intoxicated. In this second statement, he explained that he had been at a friend's home drinking when he received a call from his stepson indicating that his stepson knew where the petitioner's niece was located. The petitioner stated that he had been looking for his niece for a couple of days and that he intended to bring her home once he found her. Knowing that the individual who was with his niece was a dangerous man, the petitioner brought along a gun for protection. Before going to find his niece, he stopped by the victim's place of employment to inform her of where he would be. The victim requested that he stay until her shift ended and take her with him. He complied and had a few drinks while he waited. The victim and the petitioner left the lounge around 2:00 a.m. in a Pontiac Firebird. He stated that he and the victim got into an argument about the manner in which the victim danced at her place of employment. He said that in response to his comments, the victim lied to him and that this lying made him stop the car in a bowling alley parking lot. Petitioner got out of the car and proceeded to walk away from the victim. While in the parking lot, petitioner fired a shot in the air. The victim requested that the petitioner return to the car

and the petitioner agreed. Once back in the car the petitioner attempted to unload the gun by removing the clip and racking the gun, which expelled a bullet. The victim and the petitioner continued to argue and the petitioner hit the windshield a number of times. He also continued to play with the gun by racking it. Sometime during the argument, the petitioner pointed the gun at the victim and stated, "See how mad you make me?" The petitioner then racked the gun and the gun discharged. At the end of the interrogation, petitioner provided the police with a written statement which conformed with the verbal statements he had made during the interrogation.

At the preliminary exam, the prosecutor proffered an expert witness to testify about the firearm used in this incident. The witness testified that he racked the gun fifty times and that this racking of the gun did not result in the discharge of the gun. He also testified that when the base of the gun was struck with a metal hammer four times the gun did discharge. Petitioner was present at the preliminary examination when this testimony was given.

At trial, the petitioner testified on his own behalf. His version of the events differed from his previous statements in some important ways. He stated that the first shot, in the bowling alley parking lot, was an unexpected gun discharge. He said that he was taking the gun out of his jacket when the gun discharged. In a

previous statement, he stated that he had intentionally fired the gun in the air. He also clarified that he racked the gun while the clip was still in the gun; thus, explaining how the gun could eject one bullet from the chamber while placing another in the chamber. In addition, he stated that he could not remember how the gun discharged. He did not know whether he was hitting the windshield with the gun, but he did remember that he was playing with the gun prior to the gun discharging. Petitioner's testimony was the only evidence presented by the defense.

The prosecution offered not only the petitioner's prior statements as evidence, but also presented the testimony of numerous witnesses. The firearms expert testified to the same information that he presented at the preliminary hearing. The victim's father testified that he witnessed bruises on the victim's wrist when he visited her in the hospital. The prosecution, however, offered no medical testimony as to how or when these bruises occurred. Finally, the prosecutor presented the testimony of individuals who worked with the victim. None of these individuals were questioned about or testified to hearing the petitioner threaten the victim. Nevertheless, on cross-examination of the petitioner, and after the prosecution had rested its case, the following exchange between the prosecutor and the petitioner took place:

Q: And, when she [the victim] became a dancer, you knew the kind of place it was, is that right?
A: Yes, I did.
Q: In fact, you had been in the bar at an earlier - earlier times, when she was a waitress, isn't that right?
A: Yes, I did.
Q: Did you ever deliver a bullet to her?
A: A what?
Q: A bullet?
A: No.
Q: Didn't you in fact deliver a bullet to one of the waitresses, and say to her that, "This one's for Vicki," several - just a few months before this?
A: No.
Q: And, if someone came in, and testified to that effect, that -
Mr. Strauss [defense counsel]: (Interposing) I'd object, this is improper cross-examination.
The Witness: They'd be lying, because I've never done anything like that.
Mr. Strauss: I'll withdraw the objection.
Ms. Petito [prosecutor]: Okay.
Q: Now, let's - you in fact -
A: (Interposing) Can I ask you something? How come you insinuate something like this, that is an out-and-out lie?
Ms. Petito: Well, your Honor -
Mr. Strauss: (Interposing) Your Honor -
The Court: (Interposing) Now, just a moment.
Ms. Petito: I can make a showing.
The Court: Just a moment.

Ms. Petito: If we want to get into it.

The Court: The lawyers ask the questions, not the witnesses. I have told the jury, at least six times, anything the lawyers say, either lawyer, is not evidence, it's the answers of the witnesses that provide it. The mere fact that a lawyer, either lawyer, says something, doesn't make it true.

The Witness: I apologize, your Honor.

The Court: All right.

Mr. Strauss: Your Honor, I have a motion. I ask that you hold the prosecuting attorney in contempt of court for this comment. She just rested her case, this afternoon. And, if she had some competent evidence that my client had sent a bullet, by a waitress, just a couple of months before this death, here, to this Vicki, while she was working, then she should have presented it in her case-in-chief.

The Court: Now -

Mr. Strauss: (Interposing) And, I object, and move it to be stricken, and move for a mistrial. And, you can deny them all, if you want, but they are on the record.

The Court: Anything the lawyers say is not evidence, either what Mr. Strauss said, or Ms. Petito. Let's proceed with the case. Motions are denied.

At the close of evidence, the court instructed the jury that in order to find the defendant guilty of second-degree murder, the jury had to find that the defendant had either (1) the intent to kill; (2) the intent to inflict

great bodily harm; or (3) the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. The defense counsel requested that the court instruct the jury not only on second-degree murder, but also on manslaughter. The court complied with this request and the jury was released for deliberation. The jury returned a verdict finding the petitioner guilty of second-degree murder and guilty of possession of a firearm in the commission or in the attempt to commit a felony.

II. Discussion

A. Standard of Review

Because petitioner filed his petition for a writ of habeas corpus after April 24, 1996 this court applies the standard of review as set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). This provision states as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1994 & Supp. 1999).

Before applying this new standard to the case before the court, this court must determine how this new standard differs from the standard that this court previously applied on habeas review.

In *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999), this Circuit considered the appropriate interpretation of the standard set forth in § 2254(d). The *Nevers* court reviewed the interpretations of this provision as set forth by other circuits. The court noted that other circuits viewed the "contrary to" clause as encompassing a different challenge to the state court decision than those challenges pursued under the "unreasonable application" clause. For example, the Fifth and Seventh Circuits contend that "[t]he 'contrary to' clause in § 2254(d)(1) addresses questions of pure law; the 'unreasonable application' clause in § 2254(d)(1) addresses mixed questions of law and fact; and § 2254(d)(2) addresses questions of pure fact. *Nevers*, 169 F.3d at 358. The Eleventh Circuit has adopted a two-prong test in which the court first must "determine the 'clearly established' law at the relevant time." *Neelley v. Nagle*, 138 F.3d 917, 922 (11th Cir. 1998). Then the court must apply either the

"contrary to" clause if it is a question of law and the "unreasonable application" clause if it is a mixed question of law and fact. Id. at 923-34. The First Circuit, however, has rejected the classifications of the other circuits and instead has approached the issue in the following manner:

> First, the habeas court asks whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is "contrary to" the governing rule. In the absence of a governing rule, the "contrary to" clause drops from the equation and the habeas court takes the second step. At this stage, the habeas court determines whether the state court's use of (or failure to use) existing law in deciding the petitioner's claim involved an "unreasonable application" of Supreme Court precedent.

O'Brien v. Dubois, 145 F.3d 16, 24 (1st Cir. 1998).

Although acknowledging that other circuits had taken a variety of approaches in interpreting this provision, the *Nevers* court found that it did not have to chose which specific approach it found most persuasive because the issue in the case clearly fell under the unreasonable application prong of the statute. The case before this court also falls under the unreasonable application prong

[1], so this court finds it unnecessary to choose which approach is most appropriate to adopt. [2]

The *Nevers* court announced the standard of deference to afford state court decisions under the "unreasonable application" prong of § 2254(d). This standard requires this court to uphold a state court's determination unless the "unreasonableness of a state court's application of clearly established Supreme Court precedent will not be 'debatable among reasonable jurists,' *Drinkard*, 97 F.3d at 769, if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is

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[1] Although the petitioner argues that this case falls under the "contrary to" clause because the lower court analyzed his claim under a Seventh Circuit case that was overturned by the Supreme Court, he is incorrect. The standard of review set forth in § 2254 (d) applies to this court's review of the state court decision, not our review of the district court decision. This court reviews the district court's legal conclusions de novo and its factual findings for clear error. See Nevers, 169 F.3d at 357. Because the petitioner does not assert either (1) "that the facts before the state trial court . . . were 'essentially the same as those the Supreme Court has faced earlier' and that the state court reached a result different than that reached by the Supreme Court" or (2) "that the state courts failed to apply the correct legal standards" this court's analysis focuses on the "unreasonable application" prong. *Tucker v. Prelesnik*, 181 F.3d 747, 752 (6th. Cir. 1999).

[2] This Court avoids this issue because the Supreme Court has granted certiorari and heard arguments in a case in which the issue before the Court is the appropriate interpretation of the meaning of § 2254(d). See *Williams v. Taylor*, 119 S. Ct. 1355, 143 L. Ed.2d 516 (1999).

outside the universe of plausible, credible outcomes.'" 169 F.3d at 362. We believe that it is appropriate to apply this standard to this case.

Applying the *Nevers* standard to the facts of this case, this court must ask whether there is a clearly established law which has been violated. The petitioner raises three issues on habeas. The first issue -- judicial bias -- is a structural error and if found, requires automatic reversal. The other two issues -- the prosecutorial misconduct and the ineffective assistance of counsel claims -- are to be reviewed for harmless error. Prior to the AEDPA amendments, the Supreme Court held in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed.2d 353 (1993), that federal courts should apply a higher harmless error standard when reviewing habeas claims than is appropriate on direct review. The Court held that habeas relief should be granted when the error "ha[s a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623, 113 S. Ct. at 1714. Because the AEDPA amendments were intended to restrict further federal courts' review of state courts' determinations this appeal raises the question of whether the changes to § 2254(d) require this court to adopt a new method for reviewing harmless error determinations. The *Nevers* court, however, has held that the *Brecht* standard continues to be the appropriate standard to apply on habeas review. 169 F.3d at 371. Because there has been no intervening Supreme Court

decision invalidating that panel's decision, this panel conforms to the holding in *Nevers* and applies the *Brecht* standard in its review of the state court's determination of harmless error.

Accepting that the analysis set forth by the *Nevers* court is the appropriate method for reviewing petitioner's claims, the court must first determine whether there is a "clearly established federal law" applicable to the petitioner's claim. If there is, then the court must assess whether the state court's application of this law was reasonable in light of the great deference afforded state courts. This court can overturn a state court determination only if it finds that the unreasonableness of the state court's application of the "clearly established law" is not debatable among reasonable jurists because it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *Nevers*, 169 F.3d at 362.

B. Judicial Bias

Petitioner claims that the state trial court judge was biased against his counsel; thus, infringing on his Sixth Amendment right to counsel. Petitioner asserts that there were numerous times during trial where the trial judge spoke harshly to his counsel, but he offers one specific exchange intended to demonstrate the trial court's bias. In this exchange, the trial court, outside the presence of the jury, inquired of the defendant whether he would

like to change his counsel. He suggested to the defendant that his counsel could not count and insinuated that he thought defense counsel was a jerk. He then proceeded to hold defense counsel in contempt of court, though he did allow counsel to expunge himself of contempt before the jury returned to the courtroom. Petitioner contends that the animosity between the judge and his counsel so infected his trial as to make it substantially unfair.

Because judicial bias infects the entire trial process it is not subject to harmless error review. See *Chapman v. California*, 386 U.S. 18, 23 & n.8, 87 S. Ct. 824, 827-28 & n.8, 17 L. Ed.2d 705 (1966) (stating that the right against coerced confession, the right to counsel and the right to an impartial judge were examples of constitutional rights "so basic to a fair trial that their infraction can never be treated as harmless error."). Instead, the court is required to assess whether the actions of the judge rose to the level of judicial bias. If the court determines that the actions resulted in a constitutional violation, then the court is required to overturn the state court decision. In reviewing claims of judicial bias, this court is guided by the decision in *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed.2d 474 (1994). The *Liteky* court held that "[a] judge's ordinary efforts at courtroom administration - even a stern and short-tempered judge's ordinary efforts at courtroom administration - remain immune." 510 U.S. at 556, 114 S. Ct. at 1157. The court

stated that "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" do not establish "bias or partiality." Id. at 555-56, 114 S. Ct. at 1157.

Although the trial judge did display some animosity toward defense counsel, this did not permeate the trial. Most, if not all, of the disagreements between defense counsel and the court occurred outside the presence of the jury. The state court found that the trial court's behavior did "not rise to the level of error cited in the controlling case law." Because the state court's decision was not "so clearly incorrect that it would not be debatable among reasonable jurists" we deny petitioner's request for relief and affirm the district court's decision that the trial court's action did not constitute judicial bias.

C. Ineffective Assistance of Counsel

Petitioner's second claim of error is that his trial counsel was ineffective because he failed to proffer a defense witness who would testify as to a likely cause of the bruises suffered by the decedent. In support of his argument, the petitioner offers the affidavit of Michael Dale Williams. This affidavit states that on the day of the shooting, Michael, another individual, and decedent were wrestling and that the decedent stated that this wrestling was the cause of her bruises. Petitioner contends that this

hearsay would be admissible under both M.R.E. 803(1), present sense impression, and M.R.E. 803(3), then existing mental, emotional or physical condition. Whether this testimony is admissible is not the focus of this court's review. Rather, the court must assess whether the state court's determination that counsel's actions were harmless was appropriate under the *Brecht* standard.

The standard for reviewing ineffective assistance of counsel claims is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). This test requires a reviewing court to assess whether counsel's performance was deficient. The court must determine whether counsel's performance was so deficient "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 104 S. Ct. at 2064. If the petitioner demonstrates that his counsel was deficient, he then must establish that this deficiency prejudiced the defense in order to obtain relief. Id. This test requires the court to utilize an objective standard of reasonableness. Id. at 688, 104 S. Ct. at 2064.

On direct appeal, the Michigan Court of Appeals applied the *Strickland* test in evaluating petitioner's claim. Although the court did not specifically address the issue raised on petitioner's habeas claim - unwillingness to call a crucial defense witness to testify - in its decision, its use of the *Strickland* test demonstrates that it understood and applied the appropriate standard in reviewing the

petitioner's claim of ineffective assistance of counsel. We review this decision for harmless error.

Applying *Brecht* to the facts of this case, this court finds that any error that occurred was harmless error. On his direct appeal, petitioner raised the issue of ineffective assistance of counsel, but he did not request that the court hold an evidentiary hearing; thus, this court can consider only the evidence in the record. A review of that evidence demonstrates that any error that occurred was harmless. The petitioner "bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy." *Tucker*, 181 F.3d at 754. The record shows that defense counsel believed that the prosecution did not have sufficient evidence to prove second-degree murder; thus, he chose to limit the defense to the testimony of the defendant. A review of the evidence presented at trial, of which defense counsel was aware prior to trial, supports defense counsel's belief and leads this court to conclude that petitioner has not overcome the presumption that defense counsel was exercising sound trial strategy. Finding that the state court decision should be upheld under the *Brecht* standard, this court denies petitioner's request for relief on this claim.

D. Prosecutorial Misconduct

The petitioner's third claim is that the state court's determination that prosecutorial misconduct did not

result in substantial prejudice at petitioner's trial was erroneous. Petitioner argues that this misconduct had an injurious effect on the outcome of his trial because this misconduct provided the jury with inappropriate evidence of intent. At the conclusion of petitioner's trial, the court instructed the jury as to the elements of second-degree murder and the three types of manslaughter. To convict the petitioner of either second-degree murder or involuntary manslaughter, the prosecution had to produce evidence of intent. The petitioner contends that the prosecution offered no other evidence of intent at trial; thus, for the jury to have convicted the petitioner of second-degree murder, the jury must have believed the inappropriate statements made by the prosecutor.

During the prosecution's cross-examination of the petitioner, the prosecutor insinuated by her question that the petitioner had threatened the decedent on a prior occasion. Despite the fact that the prosecution had rested its case, she stated in response to the defense counsel's objection that she could offer proof to support the question. Although the court immediately instructed the jury that nothing the attorneys say is evidence and that only the answers to the attorneys' question are to be considered as evidence, the trial court did not strike the question from the record, nor did he specifically instruct the jury to disregard the prosecutor's statements.

On direct appeal the Michigan Court of Appeals determined that the prosecution's question and remarks were prosecutorial misconduct. Yet, the court stated that it did not "believe that [the] error was so prejudicial that reversal [wa]s required for the reason that the court cured the taint with an immediate cautionary instruction." The court also reasoned that any prejudice was alleviated by the defendant's response to the question. Because prosecutorial misconduct falls into the category of trial, rather than structural, errors this court should review the state court's decision for harmless error. See *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997).

The Sixth Circuit has identified several factors that should be considered when weighing prosecutorial misconduct.

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Angel v. Overberg, 682 F.2d 605, 608 (6th Cir. 1982) (en banc).

Looking at the facts of this case in light of these factors, we agree with the state court's determination that the

prosecutor's improper questions constitute prosecutorial misconduct. Although the prosecutorial misconduct in this case does not satisfy the continual and extensive prong of the *Angel* test, it satisfies every other prong of the test and the state court found it was egregious prosecutorial misconduct. The prosecution had rested its case before raising the issue of this threat, so a strong argument can be made that the information was deliberately placed before the jurors in an attempt to mislead them. Because there were no witnesses to the shooting other than the decedent and the petitioner, the jury's decision turned on whether it found the petitioner's testimony to be credible. By insinuating that the petitioner had threatened the decedent on a prior occasion, the prosecutor called into question the defendant's testimony about his relationship with the decedent. While defendant's counsel withdrew his objection to the question after his client's answer in which he denied any threat, the prosecutor then suggested to the court that she could "make a showing," despite the fact that she had already rested her case. At no time during the presentation of her case had the prosecutor even broached this subject with any of the witnesses she presented. While the judge gave a general instruction that the lawyers' questions were not to be considered as evidence, the judge never admonished the prosecutor nor did he specifically instruct the jury to disregard the prosecutor's statement. The judge denied defense

counsel's motion to hold the prosecutor in contempt of court, his motion for a mistrial, and his request that the exchange be stricken from the record.

The prosecutorial misconduct in this case can be analogized to the trial error in the *Nevers* case. The *Nevers* court stated that "[t]he issue at the heart of Nevers's prosecution was not what Nevers did, but why he did it." 169 F.3d at 372. Because it was the province of the jury to determine Nevers's credibility the court determined that the exposure of extraneous information to the jury was not harmless under the *Brecht* standard. This case does differ from *Nevers* in that the trial court in *Nevers* accepted as true the affidavits of jurors that the extraneous information influenced the jury's decision-making process. In this case, we have no finding that the prosecutorial misconduct influenced the jury, so this court must determine whether the prosecutorial misconduct had a substantial and injurious effect on the outcome of the trial. We find that it did not.

Petitioner argues that the prosecutor's improper statements were the only evidence offered as to his intent. Had petitioner been convicted of first-degree murder we would agree that these statements could have had a substantial and injurious effect on the outcome of the trial. Petitioner, however, was convicted of second-degree murder. Although second-degree murder requires the prosecutor to prove intent, it does not require the prosecutor to prove intent to kill. Rather, a

defendant can be convicted of second-degree murder if the defendant has the intent to create high risk of death or great bodily harm with knowledge that such is the probable result. See *People v. Porter*, 425 N.W.2d 514 (Mich. App. 1988). At trial, the prosecution's theory of this case was that petitioner was guilty of second-degree murder because he had the intent to cause the risk of harm that resulted in the victim's death. The prosecution's closing arguments focused on the fact that the petitioner was waving around a dangerous weapon in an agitated state. In particular, the prosecution noted that the petitioner stated that he had pointed the gun directly at the victim immediately prior to discharge. Petitioner's statements to the police above provided sufficient evidence of intent to satisfy the requirement for a second-degree murder conviction on this theory. Although we believe that the prosecutor's statement were egregious prosecutorial misconduct we find that these statements did not have a substantial and injurious effect on the outcome of the trial. Determining that reasonable jurists could find the state court's decision to be a reasonable application of Supreme Court law, we deny petitioner's third claim for relief.

III. Conclusion

For the foregoing reasons, this court denies petitioner's request for a writ of habeas corpus and affirms the judgment of the District Court.

CONCURRING IN PART, DISSENTING IN PART

HOLSCHUH, District Judge, concurring in part and dissenting in part. I concur with the majority opinion regarding the issues of alleged judicial bias and ineffective assistance of counsel. It is only the issue of prosecutorial misconduct that causes me to dissent from the opinion of my colleagues.

Initially, and as a matter of law, I must agree with the majority that the prosecutorial misconduct in this case is subject to the doctrine of harmless constitutional error as set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). [1] If,

[1] Prosecutorial misconduct has not been considered a "structural defect" in the trial proceedings that would require an automatic reversal. See *Arizona v. Fulminante*, 499 U.S. 279 (1991). I, nevertheless, have felt that if, in applying the criteria for determining whether prosecutorial misconduct rises to the level of a violation of defendant's constitutional right to due process, see *Darden v. Wainwright*, 477 U.S. 168, 181 (1985); *Swofford v. Detella*, 101 F.3d 1218 (7th Cir. 1996), it is found that this fundamental right to a fair trial has been violated, there should be no place for a harmless error analysis. If, in applying that criteria, the prosecutorial misconduct does not rise to the level of a constitutional violation, there is no basis for habeas relief. *Darden*, 477 U.S. at 181 n.15. The misconduct in such a case can be deemed to be harmless error, but this is not the result of a *Brecht* harmless error analysis. By applying a harmless error analysis when there has been a constitutional violation, egregious prosecutorial

however, a reviewing court is in "grave doubt" as to the constitutional error's impact on the verdict, the court should deem the error as not being harmless and should reverse the conviction. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

In *Kincade v. Sparkman*, 175 F.3d 444 (6th Cir. 1999), the Sixth Circuit set forth the criteria for determining whether habeas relief should be granted for prosecutorial misconduct:

> To grant relief in such cases as this, we must find that the prosecutor's comments constituted more than simply trial error under state law. The misconduct must be "so fundamentally unfair as to deny him due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), based on "the totality of the circumstances" of the case, taking into account
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> the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or

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misconduct is permitted if the state's case is deemed to be sufficiently strong, a result that not only reflects adversely on the judicial process in criminal cases, but also does not serve as a deterrent to prosecutorial abuse. The Sixth Circuit, however, has specifically held that, in cases involving prosecutorial misconduct, the reviewing court must apply a harmless error analysis. *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979); *Pritchett v. Pitcher*, 117 F.3d 959 (6th Cir. 1997). I respect and, of course, am bound by those decisions.

> accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.
> *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (en banc) (quoting from *United States v. Leon*, 534 F.2d 667, 677 (6th Cir. 1976)).

175 F.3d at 445-46.

The majority opinion appears to apply the test for determining whether the prosecutorial misconduct in this case violated the defendant's right to due process, as set forth in *Kincade* and the earlier case of *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) and, with the exception of the prosecutorial misconduct being isolated, "every other prong of the [*Angel*] test" has been satisfied. Opinion, Section II(D). The majority nevertheless then applies the *Brecht* standard for harmless error and, because a second degree murder conviction in Michigan does not require an intent to kill, and there was sufficient evidence to support a finding of intent to create a high risk of death or bodily harm, the conclusion is reached that the prosecutorial misconduct did not have a substantial injurious effect on the outcome of the trial. I have several problems with this.

First, the issue before us, under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), is whether the decision of the Michigan Court of Appeals involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. I think it is clear from the state court's opinion

that it did not apply the criteria set forth in *Darden v. Wainwright*, 447 U.S. 168, 181 (1985) or, for that matter, the *Angel* criteria adopted in this Circuit, to determine whether the admitted prosecutorial misconduct violated defendant's constitutional right to a fair trial. Furthermore, as discussed later, I think it is also clear that the state court did not apply the *Chapman* standard in its finding of harmless error. In my view, applying the Supreme Court's *Darden* criteria or the *Angel* criteria of this Circuit, the result is that defendant's constitutional right to a fair trial was violated.

Second, even if the violation of defendant's constitutional right to a fair trial is subject to the *Brecht* standard of harmless error, I believe that the prosecutorial misconduct in this case was so outrageous that it falls within the exception noted in the following footnote in *Brecht*:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer v. Miller*, 483 U.S.756, 769, 107 S.Ct. 3102, 3110, 97 L.Ed.2d 618 (1987) (STEVENS, J., concurring in judgment). We, of course, are not presented with such a situation here.

507 U.S. at 638 n.9. In my opinion, the deliberate and especially egregious prosecutorial misconduct in the present case so infected "the integrity of the proceeding as to warrant the grant of habeas relief even if it did not substantially influence the jury's verdict." [2]

Third, even if the *Brecht* standard of harmless error is to be applied and this case does not fall within the exception noted in *Brecht*, I still would find that the defendant should be given habeas relief. Contrary to the majority view, I do not believe that simply because the state did not have to prove an intent to kill, the prosecutorial misconduct did not have a "substantial and injurious effect or influence in determining the jury's verdict." The defense was based entirely on defendant's contention that the fatal shot was fired accidentally without any intent to kill or injure his girlfriend or to create a high risk of death or injury to her. The defendant's intent was a critical element of the charged offense, and the defendant's own testimony regarding his intent was the foundation of his defense. The prosecutor's effort to destroy the defendant's credibility before the jury and to put before the jury a matter that was not in evidence - the alleged testimony of a disinterested person that would prove an intent by the defendant to kill his girlfriend - in violation of

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[2] In Section II(D) of the majority opinion, Judges Kennedy and Norris agree that "the prosecutor's statements were egregious prosecutorial misconduct."

defendant's constitutional right to cross-examine such a witness, could not, in my opinion, fail to have an influence on the jury. As the majority opinion implicitly finds, the standard cautionary instruction was inadequate to "unring the bell," and defendant's reaction to the prosecutor's statements, if anything, only served to pit his credibility against the credibility of a disinterested person who was not produced as a witness and subjected to cross-examination.

The majority finds that, apart from the attempt by the prosecutor to influence the jury in a totally improper way, there was sufficient admissible evidence in the record, in the form of petitioner's statements to the police, to support the jury's verdict. This, I believe, is an improper approach to determine whether the prosecutorial misconduct was harmless error. As the Supreme Court said in *Kotteakos v. United States*:

> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. 750, 765 (1946).

The majority states that if petitioner had been convicted of first degree murder they would agree that the prosecutorial misconduct had a substantial and injurious effect on the outcome of the trial, but since

petitioner was convicted of second degree murder, the prosecutorial misconduct did not have a substantial and injurious effect on the outcome of the trial. I cannot, however, see that the distinction between first degree murder and second degree murder is a sufficient basis for denial of relief in this case. A defendant's intent is a critical element of both crimes under Michigan law, and the prosecutorial misconduct involved proving that intent in an egregious manner and, at the same time, impugning the credibility of petitioner's own testimony concerning his intent. In my view, basic fairness, as well as the constitutional right to due process, prohibits such conduct and, regardless of the degree of the offense in question, such conduct cannot avoid having a substantial and injurious effect on the outcome of the trial.

The Michigan Court of Appeals, in finding harmless error, was required to apply the test set forth in *Chapman v. California*, 386 U.S. 18 (1967), i.e., whether the prosecutorial misconduct was "harmless beyond a reasonable doubt." There is absolutely no indication in its opinion that it followed this clearly established federal law as determined by the Supreme Court of the United States. To the contrary, it merely found that "it is unlikely that he (the defendant) suffered any prejudice as a result" (of the prosecutorial misconduct). J.A., Part 1, p. 51. Even under the high requirement of *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999), in its interpretation of what must be shown to be an "unreasonable application of

federal law," if a habeas petitioner can demonstrate that the trial error meets the *Brecht* standard, "he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt - the *Chapman* standard - was outside the realm of plausible credible outcomes, and therefore resulted from an unreasonable application of *Chapman*." *Nevers* at 371-372. In my view, this is such a case. The petitioner has shown that: (1) there is no indication whatsoever that the Michigan court applied the harmless error *Chapman* standard; (2) the prosecutorial misconduct meets the test of *Brecht*, if *Brecht* is to be applied, and was not harmless error; and (3) the Michigan court's decision therefore involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.

It is my belief that two very recent decisions by this Court support the conclusion I have reached in this case. In *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), the petitioner for a writ of habeas corpus had been convicted of first degree murder in Michigan. The defense was that petitioner killed the decedent while resisting a rape. The error of the trial court was in refusing to instruct the jury that petitioner was entitled to use deadly force to resist an imminent rape. The Michigan Supreme Court denied the petition on the ground that the error was harmless because, under the evidence presented at trial, no

reasonable juror could have believed deadly force was necessary to prevent a rape.

This Court reversed the district court's denial of habeas relief and ordered that a conditional writ of habeas corpus be granted unless Michigan commenced a new trial within 180 days of the opinion. This Court recognized the Supreme Court's decision in *O'Neal v. McAninch*, 513 U.S. 432 (1995), in which the Supreme Court emphatically stated:

> When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict," that error is not harmless. And, the petitioner must win.

Id. at 436.

Citing *O'Neal*, this Court in the *Barker* case said:

> Only if a federal habeas court can say with certainty that a trial error had little to no impact on the judgment, should the judgment stand. *See id.* at 435-38, 115 S.Ct. at 994-995. In this matter, the only thing of which this court is certain is that the erroneous jury instruction left the door wide open. A reasonable juror could have very well walked through the door and rejected Barker's claim for self defense because that juror believed that Madsen's assault would not have led to death or serious bodily injury, thereby resulting in a

> substantial and injurious influence on the verdict. Since there is grave doubt as to whether the erroneous jury instruction created a substantial and injurious influence on the verdict, the error was not harmless. Accordingly, then, the Michigan Supreme Court engaged in an unreasonable application of *Chapman's* harmless error test, and under § 2254(d), a writ of habeas corpus should issue.

199 F.3d at 874.

With only slight paraphrasing, this same language applies equally to this case:

> Only if a federal habeas court can say with certainty that a trial error had little to no impact on the judgment, should the judgment stand. See *O'Neal v. McAninch*, 513 U.S. 432 at 435-38, 115 S.Ct. at 994-995. In this matter, the only thing of which this court is certain is that the prosecutorial misconduct left the door wide open. A reasonable juror could have very well walked through the door and rejected Maurino's claim that he did not intend to create a high risk of death or great bodily harm to his girlfriend because that juror believed the prosecutor's representation that there was an impartial person who said the petitioner had given her a bullet with the statement that "this one's for Vicki," thereby resulting in a substantial and injurious influence on the verdict. Since there is grave doubt as to whether the prosecutorial misconduct created a substantial and injurious influence on the verdict, the error was not

> harmless. Accordingly, then, the Michigan Supreme Court engaged in an unreasonable application of *Chapman's* harmless error test, and under § 2254(d), a writ of habeas corpus should issue.

Also, even more recently, this Court held that an inflammatory cross-examination of the defendant and an improper closing argument (less egregious in my view than the prosecutorial misconduct in the present case), required the granting of a conditional writ of habeas corpus. In *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000), this Court said:

> It is true that the case against Boyle was relatively straightforward and strong. Given the egregious and inflammatory nature of the behavior and arguments of the prosecutor throughout trial, however, we are left with "grave doubt" as to whether the prosecutorial errors "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed.2d 353 (1993)(quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)); see also *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L. Ed.2d 947 (1995).

Id. at 717-18.

For the reasons stated above, I would reverse the judgment of the District Court and order that a

conditional writ of habeas corpus be granted unless the State of Michigan commences trial proceedings against Maurino within 180 days of this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL J. MAURINO,

Petitioner,

v. CASE NO. 97-CV-71622-DT
HON. LAWRENCE P. ZATKOFF

RICHARD JOHNSON,
Respondent.

_____/

MEMORANDUM OPINION AND ORDER

I. Introduction

Before the Court is petitioner's habeas corpus petition under 28 U.S.C. § 2254. Petitioner currently is incarcerated in Carson City Correctional Facility in Carson City, Michigan where respondent is the warden.

On November 17, 1987, a jury in Recorder's Court for the City of Detroit, Michigan found petitioner guilty of murder in the second degree, M.C.L.A. § 750.317; M.S.A. § 28.549, and possession of a firearm during the commission or attempt to commit a felony, M.C.L.A. § 750.227(b), M.S.A. § 28.424(2). The trial judge, Honorable Joseph A. Gillis, sentenced petitioner to imprisonment for twenty-five to seventy-five years for the murder

conviction and to a consecutive term of two years for the felony firearm conviction.

The convictions and sentences arose from the shooting of petitioner's girlfriend, Vicki Lee, on August 7, 1987. Ms. Lee, a barroom dancer, was shot once in the face. She died from her head wound on September 2, 1987, without regaining consciousness.

In his appeal of right, petitioner argued, among other things, that the prosecutor committed reversible error by intentionally eliciting irrelevant and prejudicial statements from witnesses. The Michigan Court of Appeals was unpersuaded by petitioner's arguments and affirmed his convictions and sentences. See People v. Maurino, No. 106298 (Mich. Ct. App. June 27, 1989). Petitioner subsequently filed a letter request under former M.C.R. 7.303 for leave to appeal or other relief. The Michigan Supreme Court denied relief in a standard order. See People v. Maurino, No. 86546 (Mich. Sup. Ct. February 26, 1990).

On December 15, 1992, petitioner filed a motion for relief from judgment, which Recorder's Court Judge Gershwin A. Drain denied on March 18, 1993. Petitioner appealed the denial of his post-conviction motion to the Michigan Court of Appeals. He claimed, among other things, that the trial judge should have disqualified himself because the judge's conduct and comments prejudiced his case and deprived him of a fair trial. Petitioner also argued on appeal that he was deprived of

his right to the effective assistance of counsel by defense counsel's failure to call Michael Dale Williams as a witness.

The Michigan Court of Appeals denied leave to appeal "for lack of merit in the grounds presented." See People v. Maurino, Nos. 167190 (Mich. Ct. App. July 20, 1994). The Michigan Supreme Court subsequently denied leave to appeal because petitioner had "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." See People v. Maurino, 448 Mich. 901, 533 NW2d 316(1995).

On April 16, 1997, petitioner filed the pending habeas petition through counsel. His arguments read as follows:

I. IN A HOMICIDE CASE WITH A DEFENSE OF ACCIDENT, THE TRIAL PROSECUTOR IMPROPERLY ACTED AS A WITNESS DEPRIVING PETITIONER OF HIS CONSTITUTIONAL RIGHT TO CONFRONTATION, BY ASSERTING WITHOUT EVIDENCE THAT PETITIONER TOLD A WAITRESS HE INTENDED TO KILL THE DECEASED.

II. PETITIONER WAS DENIED A FAIR TRIAL BY THE BIAS OF THE TRIAL JUDGE AGAINST DEFENSE COUNSEL.

III. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE A

CRITICAL DEFENSE WITNESS WAS NOT CALLED.

IV. NEW LEGISLATION PROVIDING A 1 YEAR LIMIT FOR FILING A HABEAS CORPUS PETITION DOES NOT APPLY RETROACTIVELY TO THIS PETITIONER.

Respondent argues in an answer filed through counsel that:

I. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONTATION BY A PROSECUTOR' S QUESTION POSED TO HIM.

II. PETITIONER HAS PROCEDURALLY DEFAULTED HIS CLAIMS OF JUDICIAL BIAS AND INEFFECTIVE ASSISTANCE OF COUNSEL AND CANNOT ESTABLISH A BASIS FOR HABEAS RELIEF.

II. Discussion

A. Claim IV

Petitioner's fourth claim is that his petition is not barred by the period of limitations set forth in 28 U.S.C. § 2244(d). Because this claim is potentially dispositive of petitioner's other claims, the Court will address the fourth claim first.

On April 24, 1996, the President of the United States signed the Antiterrorism and Effective Death

Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 *Stat. 1214. The AEDPA governs this case because* petitioner filed his habeas petition after the effective date of the AEDPA. Lindh v. Murphy, __ U.S. __, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997).

Among other things, the AEDPA amended 28 U.S.C. § 2244 to include a new one-year period of limitations for habeas petitions brought by prisoners challenging state court judgments. [1] Duarte v. Hershberger, 947 F.Supp.

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[1] Section 2244(d) of Title 28, United States Code, reads as follows:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted

146, 148 (D. N.J. 1996); Flowers v. Hanks, 941 F.Supp. 765, 769 (N.D. Ind. 1996). In most cases, prisoners will be required to file a federal habeas petition within one year of completing direct review of the habeas claims. See 28 U.S.C. § 2244(d)(1)(A).

Nevertheless, statutes of limitations may not arbitrarily extinguish existing rights. Instead, statutes of limitation must provide litigants with a reasonable time after the statute takes effect to commence a suit on an existing cause of action. Wilson v. Iseminger, 185 U.S. 55, 62-63 (1902).

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toward any period of limitation under this subsection. 28 U.S.C. § 2244(d)

Before the AEDPA was enacted, there was no statute of limitations for filing federal habeas petitions. Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 1721, 123 L.Ed.2d 353 (1993). The respondent, however, could invoke Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1286 n.l (9th Cir. 1997), petition for cert. filed, S.Ct. , 66 U.S.L.W. 3427 (December 9, 1997) (No. 97-953). Rule 9(a) reads as follows:

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

28 U.S.C. § 2254, Rule 9(a).

Courts agree that prisoners should be given a "reasonable time" following the passage of the AEDPA to present accrued claims in a federal habeas corpus petition. See United States v. Simmonds, 111 F.3d 737, 745-46 (10th Cir. 1997) (holding that application of the AEDPA's deadline for filing § 2255 motions was impermissibly retroactive because the movant had not been afforded a reasonable time to bring his claim); Peterson v. Demskie, 107 F.3d 92, 92 (2d Cir. 1997)(concluding "that a habeas corpus petitioner is entitled to a reasonable time after the effective date of the AEDPA to file a petition. . . ."). Most circuit courts considering the issue have determined that prisoners should be accorded one year (the equivalent of the new limitations period) from the date that the AEDPA was enacted (April 24, 1996) to comply with the new limitations period. See Calderon v. United States District Court for the Central District of California, 128 F.3d at 1287 (stating that "[n]o petition filed on or before April 23, 1997 - one year from the date of AEDPA's enactment - may be dismissed for failure to comply with [2244(d)'s] time limit."); United States v. Simmonds, 111 F.3d at 746 (holding that "the one-year limitations period reflected in the amended 28 U.S.C. § 2255 is . .. a reasonable time for prisoners to bring § 2255 motions whose convictions became final before the [AEDPA] took effect."); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996)(stating that "the 'reasonable time' after April 24, 1996, and the one-year

statutory period coalesce" and concluding that "no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d) . . . ."), reversed an other grounds, U.S. , 1 17 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997); but see Peterson v. Demskie, 107 F.3d at 93 (stating that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA."). Assuming without deciding that Maurino's petition is timely, the application for a writ ofhabeas corpus is DENIED for the following reasons.

B. Exhaustion of State Remedies

Another threshold issue is the doctrine of exhaustion of state remedies. See 28 U.S.C. § 2254(b)(1); Picard v. Conner, 404 U.S. 270, 275-78 (1971); Dombkowski v. Johnson, 488 F.2d 68, 70 (6th Cir. 1973). Petitioner raised his substantive claims (I-III) in the Michigan Court of Appeals and in the Michigan Supreme Court, and his fourth claim is not a ground for relief requiring exhaustion of state remedies. Respondent does not contest exhaustion of state remedies, and even if he did, the Court could deny the petition on the merits. See 28 U.S.C. g 2254(b)(2). Accordingly, any failure to exhaust state remedies is not a bar to habeas review.

C. Procedural Default

Respondent contends that petitioner's second and third claims are barred by petitioner's failure to raise those claims in his appeal of right and by the Michigan Supreme Court's reliance on Michigan Court Rule 6.508(D). The doctrine of procedural default provides that:

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). In other words, a state procedural default bars consideration of a federal claim on habeas review if the last state court rendering a judgment in the case clearly and expressly stated that its judgment rested on a state procedural bar. Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). [2]

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[2] The substantive changes made by the AEDPA did not change the procedural default rules. Moleterno v. Nelson, 114 F.3d 629,

The last state court to consider petitioner's second and third claims was the Michigan Supreme Court, which denied leave to appeal under M.C.R. 6.508(D). See People v. Maurino, 448 Mich. 901, 533 NW2d 316 (1995). Respondent contends that the state supreme court's reference to 6.508(D) constituted an explained state court judgment. However, the United States Supreme Court has concluded that discretionary denials of leave to appeal are not judgments. See Ylst v. Nunnemaker, 501 U.S. 797, 805-06, 111 S.Ct. 2590, 2596, 115 L.Ed.2d 706 (1991). This Court therefore concludes that the Michigan Supreme Court's reliance on Rule 6.508(D), without reference to any specific part of subsection D, was not a clear and express statement that its judgment rested on a state procedural bar. [3]

633- 34 (7th Cir. 1997); see Breard v. Netherland, 949 F.Supp. 1255, 1262-63 (E.D. Va. 1996) (concluding that the AEDPA's stronger finality rules on habeas review of capital cases "in no way suggests Congress' intent to eviscerate the procedural default rules applicable in all other habeas petitions.")

[3] M.C.R. 6.508(D) reads as follows:

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter,

Accordingly, the Court rejects respondent's argument that a state procedural default bars habeas review of petitioner's second and third claims. The Court will address all of petitioner's claims on their merits.

D. Standard of Review

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unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, 'actual prejudice' means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the 'good cause' requirement of subrule (D) (3) (A) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

M.C.R. 6.508(D) (effective October 1, 1989).

The AEDPA affects the standards for granting habeas corpus relief. Felker v. Turpin, __ U.S. __, 116 S.Ct. 2333, 2335 (1996). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA,

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A reasonable application of clearly established federal law to the facts is one which is "consistent with the facts and circumstances of the case." Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.), cert. denied, __U.S.__, 118 S.Ct. 72 (1997); see also Nevers v. Killenger, et. al., 1997 WL 816107.

E. Claim 1

Petitioner's first claim is that the prosecutor improperly assumed the role of a witness and deprived him of his constitutional right to due process and his right to confront the witnesses against him. Petitioner objects to a question put to him by the prosecutor on cross-examination. Specifically, the prosecutor asked whether petitioner had delivered a bullet to a waitress at the victim's work place and whether he had told the waitress that "This one's for Vicki."

1. The Relevant Law

State prisoners possess the right under the Sixth Amendment to confront the witnesses against them. See Olden v. Kentucky, 488 U.S. 227, 231, 109 S.Ct. 480, 482-83, 102 L.Ed.2d 513 (1988). That right includes the right to conduct reasonable cross-examination. Id.

Petitioner is asserting a right to confront and cross-examine the prosecutor, who had a duty to "refrain from improper methods calculated to produce a wrongful conviction. . . ." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314(1935). Prosecutors may not misstate the facts in their cross-examination of witnesses; nor may they make improper insinuations or assertions of personal knowledge. See id., 295 U.S. at 84-85, 88; 555 S.Ct. at 631-33. Before enactment of the AEDPA, federal habeas courts considered whether a prosecutor's remarks "so infected the trial with unfairness

as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974). Now, a court only may exercise its "judgment over a narrow ground: the reasonableness of the state court's decision on the issue of prosecutorial misconduct." Swofford v. Detella 101 F.3d 1218, 1225 (7th Cir. 1996), vacated on other grounds, _U.S._, 118 S.Ct. 439 (1997).

2. The Facts

At issue in this case are the prosecutor's questions and comments during her cross-examination of petitioner. The cross-examination reads in pertinent part as follows:

> Q And when she [Vicki Lee] became a dancer, you knew the kind of place it was, is that right?
> A Yes, I did.
> Q In fact, you had been in the bar at an earlier - earlier times, when she was a waitress, isn't that right?
> A Yes, I did.
> Q Did you ever deliver a bullet to her?
> A A what?
> Q A bullet?
> A No.
> Q Didn't you in fact deliver a bullet to one of the waitresses and say to her that, 'This one's for Vicki,' several - just a few months before this?

A No.
Q And, if someone came in, and testified to that effect, that-

MR. STRAUSS [defense counsel] (Interposing) I'd object this is improper cross-examination.
THE WITNESS: They'd be lying, because I've never done anything like that.
MR. STRAUSS: I'll withdraw the objection.
MS. PETITO [the prosecuting attorneyl: Okay.

CROSS-EXAMINATION (CONTINUED)
BY MS. PETITO
Q Now, let's - you in fact-
A (Interposing) Can I ask you something? How come you insinuate something like this, that is- an out-and-out lie?
MS. PETITO: Well, Your Honor-
MR. STRAUSS: (Interposing) Your Honor-
THE COURT: (Interposing) Now, just a moment.
MS. PETITIO: I can make a showing.
THE COURT: Just a moment
MS. PETITO: If you want to get into it.
THE COURT: The lawyers ask the questions, not the witnesses. I have told the jury, at least six times, anything the lawyers say, either lawyer, is not evidence, it's the answers of the witnesses that provide it. The mere fact that a lawyer, either lawyer, says something, doesn't make it true.

T at 513-515. [4] Following this exchange and cautionary instruction, defense counsel unsuccessfully moved for a mistrial and to hold the assistant prosecutor in contempt of court or to have the prosecutor's comment stricken.

3. The State Court Ruling

The Michigan Court of Appeals addressed petitioner's allegation of prosecutorial misconduct in relevant part as follows:

> It is well established that the prosecution may not attempt to inject unfounded prejudicial innuendo or fatally infect a trial through the process of asking improper questions. See People v De Paolo, 366 Mich 394; 115 NW2d 78 (1962); People v Morgan, 86 Mich App 226; 272 NW2d 249 (1978). We agree with defendant that the prosecutor's question regarding the bullet violated that rule. However, we do not believe that error was so prejudicial that reversal is required for the reason that the court cured the taint with an immediate cautionary instruction. Moreover, because the substance of the exchange reveals that defendant handled the questioning very well, it is unlikely that he suffered any prejudice as a result. See People v

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[4] T refers to the transcript volumes of trial, consisting of five volumes consecutively paginated.

Buckey, 424 Mich 1, 17-18; 378 NW2d 432 (1985), reh den 424 Mich 1205 (1986).

People v. Maurino, No, 106298 (Mich. Ct. App. Jun 27, 1989) at 8.

4. Conclusion

The decision of the Michigan Court of Appeals was consistent with the facts and circumstances in this case. The record, as quoted above, demonstrates that, although the prosecutor insinuated that petitioner had delivered a bullet to Vicki Lee, petitioner effectively challenged the insinuation. Additionally, defense counsel pointed out that the prosecutor could have presented the evidence, if true, in her case-in-chief, T at 515, and no other reference was made to the bullet. Furthermore, the trial court gave an immediate cautionary instruction and reminded the jury at other times during the trial that the comments and questions of the attorneys were not evidence. See T at 75, 273, 518, 566, 612.

The alleged prosecutorial misconduct in this case was not "pronounced and persistent" and its probable effect on the jury can be disregarded as inconsequential. Berger v. United States, 295 U.S. at 89, 55 S.Ct. at 633. Therefore, the state court's determination that the prosecutor's questions were not prejudicial was a reasonable conclusion, and petitioner has no right to habeas relief on the basis of his first claim. Hennon v.

Cooper, 109 F.3d at 335; Swofford v. Detella 101 F.3d at 1225.

F. Claim 2

Petitioner's second claim is that the trial judge was biased against defense counsel and deprived petitioner of a fair trial. Petitioner notes that the trial court permitted the prosecutor, but not defense counsel, to question the jury venire directly. Petitioner also points to an instance during which the trial court questioned defense counsel's competency.

1. The Case Law

A judge's conduct may support a bias or partiality challenge if the judge displayed "a deep seated favoritism or antagonism that would make fair judgment impossible." Liteky v. U.S., 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). Critical, disapproving, and even hostile comments generally are insufficient to establish bias or partiality. Id., 510 U.S. at 555-56; 114 S.Ct. at 1157. Even expressions of impatience, dissatisfaction, annoyance, and anger are immune from allegations of as or partiality. Id.

Moreover,

> 'Unless they amount to constitutional violations, prejudicial comments and conduct by a judge in

> a criminal trial are not proper subjects for collateral attack on a conviction.' Brinlee v. Crisp, 608 F.2d 839, 853 (10th Cir. 1979), cert. denied, 444 U.S. 1047, 100 S.Ct. 737, 62 L.Ed.2d 733 (1980). In collateral proceedings, the test is 'whether the errors alleged ... could have rendered [the] trial fundamentally unfair.' Buckelew v. United States, 575 F.2d 515, 518 (5th Cir. 1978). To violate a defendant's right to a fair trial, 'a trial judge's intervention in the conduct of a criminal trial would have to reach a significant extent and be adverse to the defendant to a substantial degree.' Daye v. Attorney General of New York, 712 F.2d 1 566, 1572 (2d Cir. 1983), cert. denied, __ U.S __, 104 S.Ct. 723, 79 L.Ed.2d 184 (1984).

McBee v. Grant, 763 F.2d 811, 818 (6th Cir. 1985).

2. The Facts

During jury selection in this case, Judge Gillis initially permitted the prosecutor, but not defense counsel, to address the jury venire. See T at 12-38. Nevertheless, after defense counsel objected to this procedure, Judge Gillis required the prosecutor to submit her questions to him so that he could present her questions, as well as defense counsel's questions, to the panel. See T at 46-62.

Defense counsel challenged the prosecutor's use of peremptory challenges. Later, during opening

statements, defense counsel commented on the prosecution's failure to give him a copy of petitioner's taped statement. T at 95-99. Defense counsel also objected to the fact that the charge against petitioner had been changed when the victim died from assault with intent to commit murder to second-degree murder. T at 106-07. Defense counsel subsequently claimed in his opening statement that the police had compelled his client to appear in court without counsel. Judge Gillis then excused the jury and said:

> THE COURT: All right. You are retained, all right.
>
> I question your competency. The first thing that happened, here, we had the motion outside the presence of the jury. There was evidence that you could not count to five, went in there and said there was a systematic exclusion. There were five jurors sitting, five black jurors sitting here. She had excused three black jurors, and left five on, and four white jurors.

T at 109.

A discussion followed about petitioner's taped statement, which the prosecutor said was in the possession of police officers. When defense counsel claimed that he did not know who had possession of the tape, Judge Gillis said, "Mr. Maurino, do you want to continue with this lawyer?" Petitioner replied affirmatively, and Judge Gillis proceeded to say, "Now, I've pointed out that he can't count to five. He can't tell a

black person from a white person." T at 109-116. Defense counsel then asked Judge Gillis to disqualify himself. Judge Gillis responded as follows:

> THE COURT: It's a little late.
>
> Now, first of all, let me point out the problem I have. I have had five reversals, because of incompetent defense counsel. It is a very difficult thing for a judge. When I see you are not giving proper representation, I want to point that out to the defendant. And, if he wants to change counsel--some of them have decided to change counsel, at that point. Now, I don't know how to handle it. When the Court of Appeals says the defense counsel was a jerk, the defendant gets a new trial. I can't make it any plainer than that. That has happened five times, to me, in twenty years. I am trying to solve the problem. And, one of the problems is that I have to point out these problems to the defendant. Then, I offer the defendant the chance to get another lawyer, get a court-appointed lawyer if you have no money, and get another trial, in front of another jury.
>
> Now, I have made that record.

T at ll7.

Judge Gillis subsequently found defense counsel in contempt of court, allegedly for interrupting him. Petitioner then said that he did not like everything that was going on. He asked for a different judge, and he

informed Judge Gillis that, in his opinion, Judge Gillis was intimidating his lawyer. T at ll8.

3. The State Court Ruling

Judge Drain adjudicated petitioner's claim of judicial bias in relevant part as follows:

> Defendant's initial argument is that 'the trial judge's conduct's and comments influenced the jury to the detriment of the defendant's case and thereby deprived him of a fair trial.' Defendant cites two cases in support of his argument, however, the gravamen of this line of cases is whether the comments invaded the province of the jury and 'pierced the veil of judicial impartiality.' People v Roby, 38 Mich App 387, 389; 196 NW2d 346 (1972) quoted in People v Audison, 126 Mich App 829, 833; 388 NWZd 235 (1983).
>
> The instances cited by the defendant do not rise to the level of error cited in the controlling case law, therefore this court finds the claim to be without merit. Similarly, having reviewed the colloquy between the court, defense counsel, and the defendant, 'this court is not persuaded that the trial judge erred in sua sponte, failing to disqualify himself.' People v Anderson, 112 Mich App 640, 651; 317 NW2d 205 (1981). Thus defendants second claim is denied.

See appendix to habeas petition, attachment number 4 at 1-2.

4. Conclusion

During voir dire, Judge Gillis treated the attorneys similarly after defense counsel pointed out Judge Gillis' inconsistent treatment. The trial judge's handling of voir dire was not sufficiently adverse to petitioner to suggest bias or to deprive petitioner of a fair trial.

The subsequent exchange between Judge Gillis and defense counsel indicates that Judge Gillis may have been impatient or annoyed with defense counsel. Nevertheless, Judge Gillis made the comments in the jury's absence. Consequently, the jury did not hear Judge Gillis' question defense counsel's competency and suggest that petitioner retain another attorney.

It also does not appear that the comments sowed discord between petitioner and defense counsel. The record indicates that petitioner rallied to his attorney's defense. Additionally, before the jury returned to the courtroom, Judge Gillis set aside the contempt citation. T at 124. For the remainder of the trial, Judge Gillis treated defense counsel in an appropriate manner.

The trial judge's conduct did not rise to the level of being a deep-seated bias or antagonism such that a fair judgment was impossible. Thus, the state court ruling on the issue was a reasoned judgment, one that was

consistent with the facts and circumstances. Accordingly, the Court defers to the state court's conclusion that petitioner's claim has no merit.

G. Claim III

At trial, the prosecutor elicited testimony that there were bruises on Vicki Lee's wrists and forearms after the shooting. T at 288. The prosecutor's position was that petitioner caused the bruises. T at 86, 551, 580-81.

Petitioner's defense was that the gun fired accidentally. He testified that he never laid a hand on the victim and did not cause the bruises. T at 550-51.

Petitioner claims that he was denied the effective assistance of counsel because defense counsel failed to call Michael Dale Williams as a witness. In an affidavit dated November 2, 1992: Williams states that he and his cousin caused Vicki Lee's bruises during "horseplay" on August 7, 1986. See appendix to habeas petition, attachment number 8. Petitioner alleges that Williams' testimony would have explained that the bruises were unrelated to petitioner's actions later on the same day.

1. The Relevant Law

To demonstrate ineffective assistance of counsel, petitioner must show that defense counsel's performance was deficient and that the deficient performance

prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). However, under "the amended standards of review codified in the AEDPA ... federal habeas courts must now honor the conclusions of state courts regarding the constitutional effectiveness of counsel, unless such determinations constitute an 'unreasonable application' of established federal law, as determined by the Supreme Court." Carter v. Johnson, 110 F.3d 1098, 1110(5th Cir. 1997), vacated on other grounds, __ U.S.__, 118 S.Ct. 409, 139 L.Ed 2d 313 (1997).

2. The State Court Ruling

Recorder's Judge Gershwin Drain concluded in his post-judgment opinion that there was little or no difference between the state and federal tests for ineffective assistance of counsel. Judge Drain then addressed petitioner's ineffective-assistance-of-counsel claim as follows:

> Defendant lists a number of alleged witnesses whom he insists could have testified as to how the victim received bruises on her neck and arm or could have testified regarding the defendant's relationship with the deceased and his character.
>
> However, a comprehensive review of the record reveals that counsel performed at least as well as an attorney with ordinary training and

skill in criminal law and conscientiously protected his clients interests, undeflected by conflicting considerations.

Further this court finds that defense counsel did not make a serious mistake but for which the defendant would have had a reasonably likely chance of acquittal. This court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, particularly where the presentation of witnesses would only have illicited inadmissible hearsay testimony. People v Whalen, 129 Mich App 732; 342 NW2d 917 (1983). This court finds no basis upon which to order that a testimonial record be made pursuant to People v Ginther, 390 Mich 436; 212 NW2d 922 (1973) or to hold that defense counsel was ineffective.

Appendix to habeas petition, attachment number 4 at 8.

3. Conclusion

The state court's determination that defense counsel performed at least as well as an attorney with ordinary training and skill and that defense counsel conscientiously protected petitioner's interests was a reasonable application of Strickland v. Washington. Defense counsel was an experienced criminal defense attorney and a zealous advocate for petitioner throughout the proceedings. Moreover, as respondent points out, petitioner has not demonstrated that defense counsel

was aware of Mr. Williams' affidavit, which is dated almost five years after petitioner's trial.

Consequently, the failure to call Williams as a witness could not have prejudiced the defense. The Court therefore honors the state court's determination that defense counsel's performance was not deficient and, even if it were, the alleged deficiency did not prejudice the defense. Petitioner has no right to habeas relief on the basis of his third claim. Carter v. Johnson, 110 F.3d at 1110.

III. Conclusion

Petitioner's habeas petition is timely. However, his substantive claims have no merit. Accordingly, the Court DENIES petitioner's application for habeas corpus relief.

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

DATED: February 18, 1998

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

V

MICHAEL J. MAURINO,
Defendant-Appellant.

JUN 27 1989
No. 106298

Before: Doctoroff, P.J., and Maher and Reilly, JJ.

PER CURIAM.

Following a jury trial in the Detroit Recorder's Court, defendant was found guilty of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was thereafter sentenced to twenty-five to seventy-five years imprisonment for the murder conviction plus two years consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from the shooting death of his girlfriend, Vicki Lee, who was a topless dancer at the Silver Cricket Bar in Dearborn Heights. At trial, the prosecution submitted proofs in support of its theory that defendant was upset and angry with Vicki because she planned to break off their relationship and move out of his apartment. On August 7, 1907, defendant met Vicki after she got off work and, as the

two sat in her car, an argument ensued. Defendant then intentionally shot Vicki in the face from point blank range, eventually resulting in her death. Defendant did not deny shooting Vicki. However, he claimed the gun discharged accidentally when he banged it against the car windshield while arguing with Vicki.

Defendant first argues on appeal that he was denied a fair trial because the court allowed irrelevant or prejudicial evidence to go before the jury. We find no error requiring reversal.

Generally, all relevant evidence is admissible at trial while irrelevant evidence is not. MRE 402; People v McCracken, 172 Mich App 94, 98; 431 NW2d 840 (1988). Relevant evidence is that which has a tendency to make the existence of any material fact more probable or less probable than it would be without the evidence. MRE 401. Even if relevant, though, such evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, if it would result in the confusion of issues, or if it constitutes the needless presentation of cumulative evidence. MRE 103; People v Siler, 171 Mich App 246; 252; 429 NW2d 865 (1988). Unfair prejudice exists when there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury, or when it would otherwise be inequitable to allow use of the evidence. People v Harvey, 167.Mich App 734, 745-746; 423 NW2d 335 (1988) (quoting Scalfani v Peter S Cusimano, Inc,

130 Mich App 728, 735- 736; 344 NW2d 347 [1983]). The decision whether to admit or exclude evidence is within the sound discretion of the trial court. That decision will not be reversed absent a clear abuse of discretion. Siler, supra, p 252, People v Harden, 166 Mich App 106, 111; 420 NW2d 136 (1988). An abuse of discretion exists if an unprejudiced person, upon considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. People v Hamm, 100 Mich App 429, 438; 298 NW2d 896 (1980), lv den 411 Mich 888 (1981).

A. Testimony of Vicki's father.

William Lutz, Vicki's father, testified that he went into Vicki's hospital room and kissed her good-bye after being told she wall "brain dead." He also stated that, when he did this, he "felt" there was some life left in her. Defendant did not object to that testimony (contrary to what he now asserts in his appellate brief). Because he did not object, appellate review is precluded unless manifest injustice would result. People v Federico, 146 Mich App 776, 791; 381 NW2d 819 (1985), lv den 425 Iich867 (1986). We fail to discern how defendant suffered prejudice by the testimony as it was very brief and not overly inflammatory. Therefore, reversal is not required.

Mr. Lutz also testified that he visited Vicki in the hospital everyday from the time she was admitted

(August 7) until she finally passed away (September 2). That testimony was relevant because it established that Lutz had ample opportunity to observe Vicki's physical condition and that he observed bruises on her body. This evidence supported the prosecution's theory that defendant had physically restrained Vicki sometime on the night in question and that their relationship was not amiable.

B. Testimony regarding Vicki's dancing, her relationship with dafendant, marriage plans and financial situation,' and their drug use.

The testimony complained of by defendant was admissible because it was probative of his motivation for shooting Vicki intentionally and was not unduly prejudicial. MRE 401, 402 and 403; People v Deitz, 86 Mich 419, 125; 19 NW 296 (1891). Moreover, as to much of the testimony, either defendant or counsel "opened the door" for its admission through their questions or statements. People v Duncan, 402 Mich 1, 161 260 NW2d 58 (1977).

C. Excluded testimony of Officer Webber.

During the direct examination of Officer James Webber, the prosecutor submitted into evidence a videotaped statement and a written statement made by defendant in the officer's presence. On cross-examination, defense counsel began questioning Officer

Webber as to specific statements made by defendant when the prosecutor interjected the following objection:

> "Your Honor, I'm going to make an objection. He should be asking not what the defendant was asked, because that's hearsay, when offered by the defendant himself. He is merely going through the back door, of just getting the testimony. If he wants to cross-examine him about something the police officer did, or some concern he had with the statements the defendant gave that night, I certainly have no objection to that. But, I think he is just repeating the defendant's statement, which has already been offered into evidence."

The trial court noted that both the videotaped statement and written statement were admitted into evidence and, therefore, sustained the prosecutor's objection.

We believe the trial court properly limited defense counsel's questioning on the specific statements made by defendant. The statements spoke for themselves and the testimony defense counsel sought to elicit would have merely been cumulative. Hence, the testimony was excludable. MRE 403. We cannot say the trial court abused its discretion in this regard.

II

Defendant next argues he was denied the effective assistance of counsel because of trial counsel's "continued

arguments with the judge and prosecutor, and his argumentative and abusive questioning of witneses." We disagree.

Initially, it must be pointed out that our review of this issue is limited to the record presently before us. Because defendant failed to move for a new trial or an evidentiary heating on the basis of ineffective assistance of counsel, we may not review claims which are not sufficiently contained in the record from which to reach and decide the issue. People v Ginther, 390 Mich 436, 442-443, 212 NW2d 922 (1973); People v Cicotte, 133 Mich App 630, 636; 349 NW2d 167 (1984).

The right to counsel guaranteed by both the federal and state constitutions (US Const, Am VI; Const 1963, art 1, S 20) means the right to effective assistance of counsel. United States v Cronic, 466 US 648, 654; 101 S Ct 2039; 80 L Ed 2d 657 (1984). There is a strong presumption that defense counsel provided effective assistance to the defendant. People v Tranchida, 131 Mich App 446, 449, 346 NW2d 338 (1984). The burden of proving otherwise is on the defendant. Ginther, supra.

To establish a claim of ineffective assistance of counsel under the Sixth Amendment of the United States Constitution, the defendant must show that (1) counsel's professional performance was deficient and unreasonable under prevailing norms of practice considering all the circumstances, and (2) the deficient performance so prejudiced the defense that a reasonable

probability exited that the fact-finder would have had a reasonable doubt respecting defendant's guilt. Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 1 Ed 2d 671, 693, 698 (1984). Furthermore, the benchmark for judging a claim of ineffectiveness under the federal constitution is whether defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. 80 L Ed 2d 692-693.

In determining ineffective assistance of counsel claims under the state constitution, there is currently a split among panels of this Court as to the appropriate standard to apply. Most panels of this Court, especially the earlier ones, have applied the test outlined in People v Garcia, 338 Mich 250, 264- 266; 247 NW2d 517 (1976), reh den 399 Mich 1011 (1917). Garcia etablished a two-part test for reviewing such claims. First, defense counsel must have performed at least as well as a lawyer with ordinary training and skill in the criminal law and must have conscientiously protected the defendant's interests, without conflicting considerations. Id. (quoting Beaslev v United States, 491 F2d 687, 696 [CA 6, 1974]). Second, defense connsel must not have made-a serious mistake but for which the defendant would have had a reasonably likely chance of acquittal. Id., p 266. Decisions of this Court which have applied the Garcia standard include People v Krvsztopaniec, 110 Mich App 588, 593; 429 NW2d 828 (1988); People v Duff, 165 Mich App 530,

542-543; 419 NW2d 600 (1987), lv den 430 Mich 900 (1988); People v White, 142 Mich App 581; 370 NW2d 405 (1985), lv den 122 Mich 968 (1985); People v Vicuna, 14l Mich App 486; 361 NW2d 887 (1985).

ln People v Dalessandro, 165 Mich App 569, 575; 419 NW2d 609 (1987), lv den 430 Mich 880 (1988), it was held that Strickland overruled Garcia. Therefore, the Court applied the Strickland test in reviewing a claim of ineffective assistance of counsel under the Michigan Constitution.

In the case at bar, we need not decide whether Strickland or Garcia controls the state constitutional claim because our decision on the issue would be the same under either standard. People v Hunt, 170 Mich App 1, 15; 427 NW2d 07 (188), lv pending.

In regards to defense counsel's questioning of various witnesses, including Vicki's father, we believe this was a matter of trial strategy which we will not second-guess on appeal. Strickland, supra, 80 L Ed 2d 695; People v Lotter, 103 Mich App 386, 390-391; 302 NW2d 879 (1981), lv den 412 Mich 852 (1981). Although defendant argues that counsel's strategy was unsound, there is nothing in the record to support that claim. Instead, it appears from the record that counsel, through his questioning, hoped to either demean the witnesses in the eyes of the jury or show bias on the part of the witnesses. This was legitimate trial strategy.

As to defense counsel's arguments with the trial court and the prosecutor, this too does not support defendant's claim. Many of the arguments complained of were made outside the jury's presence and, therefore, it difficult to perceive how defendant suffered any prejudice thereby. Those arguments which were made in front of the jury were not frivolous or irrational (.ee People v Strodder, 391 Mich 193; 229 NV?d 318(19751), but were reasonable efforts to protect defendant's interests and ensure him a fair trial. While defense counsel may have been over-zealous in his objections or arguments at times, we do not believe the jury viewed this negatively or, if it did, that it held counsel's acts against defendant. Because he suffered no prejudice by defense counsel's representation, defendant has failed to establish a claim for ineffective assistance of counsel. People v Reinhardt, 161 Mich App 581, 591; 432 NW2d 275 (1988), lv den 430 Mich 874 (1988).

III

Next, defendant claims he was denied a fair trial because of prosecutorial misconduct for (1) eliciting the alleged irrelevant or prejudicial testimony discussed in issue I, supra, and (2) injecting prejudicial and unsupported facts into trial during their cross-examination of defendant. Having previously discussed and rejected the alleged errors asserted in (1), above, we

find that they offer no support to defendant's claim herein. Our discussion of this issue will be limited to the error asserted in (2), above.

During the prosecutor's cross-examination of defendant, the following colloquy occurred;

> Q Did you ever deliver a bullet to her [Vicki]?
> A A what?
> Q A bullet?
> A No.
> Q Didn't you in fact deliver a bullet to one of the waitresses and say to her that, 'This one's for Vicki,' several - just a few months before this?
> A No.
> Q And, if someone came in, and testified to that effect, that-
>
> MR. STRAUSS [defense counsel] (Interposing) I'd object this is improper cross-examination.
> THE WITNESS: They'd be lying, because I've never done anything like that.
> MR. STRAUSS: I'll withdraw the objection.
> MS. PETITO [prosecutor]: Okay.

Immediately after this exchange, the trial court cautioned the jury that nothing the attorneys say is evidence and "(t]he mere fact that a lawyer, either - lawyer, says something, doesn't make it true."

It is well established that the prosecution may not attempt to inject unfounded prejudicial innuendo or

fatally infect a trial through the proceas of asking improper questions. See People v Di Paolo, 366 Mich 394; 115 NW2d 78 (1962); People v Morgan, 86 Mich App 226; 272 NW2d 249 (1978). We agree with defendant that the prosecutor's question regarding the bullet violated that rule. However, we do not believe that error was so prejudicial that reversal is required for the reason that the court cured the taint with an immediate cautionary instruction. Moreover, because the substance of the exchange reveals that defendant handled the questioning very well, it is unlikely that he suffered any prejudice as a result. See People v Buckey, 421 Mich 1, 17-18; 378 NW2d 432 (1985), reh den 424 Mich 1285 (1986).

IV

Defendant next claims he is entitled to resentencing because he was misled by the court into believing it would impose a sentence of life imprisonment, which would entitle him to seek parole in ten years. By imposing a minimum sentence of twenty-five years imprisonment, defendant argues, the court effectively imposed a longer sentence than promised because second-degree murder is a Proposal B offence (requiring him to serve the full term of his minimum sentence).

It is undisputed that minimum sentence imposed by the court was within the recommended range of the

sentencing guidelines, which was ten years to life imprisonment. The sentence is, therefore, presumptively valid. [1] People v Broden, 428 Mich 345, 351-355; 408 NW2d 189 (1987). Defendant has not rebutted that presumption. The court stated it would not impose a sentence greater than life imprisonment; it did not say it would impose life imprisonment. As a matter of law, a sentence of any term of years, at least that which does not grossly exceed the defendant's life expectancy, is a lighter sentence than a parolable life term. This is true even though the defendant may be eligible for parole sooner under the life term. People v Crawford, 161 Mich App 77, 82; 409 NW2d 729 (1987). Here, the minimum sentence of twenty-five years imprisonment was less than a life term.

Although defendant claims he was misled by the court, there is no indication this harmed or prejudiced him in any way. Both he and defense counsel fully exercised their rights to speak to the court regarding the appropriate length of imprisonment and both were given the opportunity to challenge the scoring of the guidelines. The court's statements did not amount to a sentencing agreement and defendant did not forego any rights in

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[1] Defendant does not claim that the twenty-five year minimum sentence exceeds his reasonable life expectancy. People v Moore, __ Mich __; __ NW2d __ (Docket No. 80432, rel'd 5/9/89). Therefore, we need not decide that question.

reliance thereon. For the above reasons, we hold that defendant is not entitled to resentencing.

Lastly, defendant argues that the above errors, although perhaps harmless by themselves, constitute reversible error when considered together. See Strodder supra; People v Washington, 100 Mich App 628, 634; 100 NW2d 347 (1980), lv den 410 Mich 878 (1981). We disagree. The complained of errors, whether considered individually or aggregately, did not deny defendant a fair trial so as to require reversal of his conviction.

Affirmed.

/s/ Martin M. Doctotoff
/s/ Richard M. Maher
/s/ Maureen Pulte Reilly

STATE OF MICHIGAN
IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v. Case No. 87-8821

MICHAEL MAURINO, Hon. Gershwin A. Drain
Defendant.

_____/

OPINION

Defendant was convicted of second-degree murder, MCR 750.317; MSA 28.549 and carrying a firearm during the commission of a felony MCL 750.227b; MSA 28.424(2). He was sentenced to serve a term of two years consecutive to a term of 25 to 75 years incarceration and assessed Three Hundred Thousand dollars restitution. Following his conviction, defendant filed a Motion for a New Trial and a Motion to Set Aside the Sentence and for Resentencing, which was denied.

Thereafter, defendant appealed his convictions to the Michigan Court of Appeals, however in a per curiam opinion his conviction was affirmed. Subsequently, on leave to appeal, on Order of the Michigan Supreme Court, defendant's letter request pursuant to MCR 7.307 was denied.

Defendant now moves for relief from judgment pursuant to MCR 6.500.

Defendant's initial argument is that "the trial judge's conduct's and comments influenced the jury to the detriment of the defendant' s case and thereby deprived him of a fair trial."

Defendant cites two cases in support of his argument, however, the gravamen of this line of cases is whether the comments invaded the province of the jury and "pierced the veil of judicial impartiality. " People v Roby, 38 Mich App 387, 389; 196 NW2d 346 (1972) quoted in People v Audison, 126 Mich App 829, 833; 338 NW2d 235 (1983).

The instances cited by the defendant do not rise to the level of error cited in the controlling case law, therefore this court finds the claim to be without merit. Similarly, having reviewed the colloquy between the court, defense counsel, and the defendant, "this court is not persuaded that the trial judge erred in sua sponte, failing to disqualify himself," People v Anderson, 112 Mich App 640, 651; 317 NW2d 205 (1981). Thus defendants second claim is denied.

Thirdly, defendant states that the court inappropriately allowed the sentencing guidelines calculations to include scoring for premeditation and deliberation. Defendant was charged with and convicted of murder in the second degree, the courts comments regarding planning and preparation were directed

towards defendants possession of a firearm, not the crime of second-degree murder. The court stated ample reasons on the record for the sentence which was imposed; unlike, People v Glover, 154 Mich App 22, 44-45; 397 NW2d 199 (1986), cited by the defendant, the court in the case at bar, did not make an independent finding of defendant's guilt on another charge and assert that as a basis justifying sentence.

In his fourth claim defendant states that the court should remand the case back for resentencing in light of People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990). The Milbourn court expressly limited its holding to certain categories of cases:

> [I]t is our judgment that our present decision to modify the nature of appellate sentence review applies to: (1) currently pending appeals in which the issue of sentence length has been raised or preserved, (2) currently pending first appeals in which the appellant's initial brief has not yet been filed, and (3) appeals filed after the date of the decision [September 11, 1990]. Id. at 670.

Defendant's conviction was affirmed by the Court of Appeals on June 27, 1989, he clearly had no appeal pending when Milbourn was decided on September 11, 1990. Therefore Milbourn's limited retroactivity does not apply to this case. People v Barris, 190 Mich App 652, 668; 476 NW2d 767 (1991).

Defendant's fifth claim is that the trial court failed to properly determine the amount of restitution as stated in MCL 780.767. [1]

With regard to the amount of loss suffered by the victim, the father of the deceased stated the expenses consisted of medical as well as funeral expenses, the presentence report states, in pertinent part:
VICTIM'S IMPACT STATEMENT:

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[1] (1) The court, in determining whether to order restitution under section 16 [MCL 780.766] and the amount of that restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant, the defendant's dependents, and such other factors as the court deems appropriate,
(2) The court may order the probation officer to obtain information pertaining to the factors set forth in subsection (1). The probation officer shall include the information collected in the presentence investigation report or in a separate report as the court directs.
(3) The court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence report pertaining to the matters described in subsection (1).
(4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the earning ability of the defendant and the amount of the loss sustained by a victim as a result of the offenseshall be on the prosecuting attorney. The burden of demonstrating the financial resources of the defendant shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be on the party designated by the court as justice requires.

> We spoke with Mr. William Lutz, father of the deceased. Mr. Lutz informs us that he now owes over $300,000 as a result of the within offense. He states that his daughter, the victim, spent 26 days in the Intensive Care Unit at a cost of over $11,000 per day. In addition, he spent approximately $6,000 for the funeral. Mr. Lutz informs us that he is self-employed and owed no money to anyone prior to the within offense being committed. However his daughter had no insurance. He states that he authorized surgery as well as any other medical attention that his daughter needed. Mr. Lutz states that he had to mortgage everything that he owned, and he is afraid that everything will be attached soon. Regarding the financial impact that this offense has had on the family, Mr, Lutz states, "It's just about to break us." [2]

The court finds that the presentence report in the instant case did provide sufficient detail as to the loss sustained by the deceased's father as to allowable damages, to wit: medical expenses and funeral expenses. People v Sickles, 162 Mich App 344, 361-362; 412 NW2d 734 (1987), lv den 429 Mich 898 (1988).

In addition to the trial court having a sufficient basis on which to determine the amount of losses to the deceased' father by virtue of what was contained in the presentence report, the deceased's father also had the

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[2] Presentence Report p.2.

following colloquy with the trial court at the time of sentencing:

THE COURT: What was your total hospital bill? Have you ever got billed?
MR. LUTZ: Not totally. We have an understanding of it to be approximately eleven thousand dollars a day, for twenty-six days. Plus, we have the funeral expenses --
THE COURT: (Interposing) How much were they?
MR. LUTZ: (Continuing) -- which totalled over six thousand dollars.
THE COURT: All right. Well, the three hundred thousand dollars is correct. [3]

The deceased's father provided enough information at the sentencing proceeding to show that his losses were "easily ascertained and measured". Tyler, supra, 188 Mich App at 89. The fact that Mr. Lutz stated that he hadn't actually received the total hospital bill is of no consequence; MCL 780.766(1) includes in its definition of a victim an individual who suffers direct or threatened financial harm.

With respect to the issue of Defendant's earning ability the court finds that this issue will not be relevant until such time as the defendant serves the substantial term of years to which he was sentenced and has been

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[3] Sentencing Transcript pp. 11-12.

paroled and is thereby called upon to pay restitution. MCL 766(13) and (14). [4]

Defendant is not an aggrieved party at this point with respect to restitution. This court will not order the prosecution to demonstrate defendants earning ability at this time.

Defendant sixth allegation includes assertions of ineffective assistance of both trial and appellant counsel. It is well-established that the Sixth Amendment to the

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[4] MCL 780.766(13) and (14) provides:

(13) If the defendant is placed on probation or paroled, any restitution ordered under this section shall be a condition of that probation or parole. The court may revoke probation and the parole board may revoke parole if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order. In determining whether to revoke probation or parole, the court or parole board shall consider the defendant's employment status, earning ability, financial resources, and the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(14) A defendant who is required to make restitution and who is required to make restitution and who is not in willful default of the payment of the restitution at any time, any petition the sentencing judge or his or her successor for a cancellation of any unpaid portion of the restitution, if it appears to the satisfaction of the court that payment of the amount due will impose a manifest hardship on the defendant or his or her immediate family, the court may cancel all or part of the amount due in restitution or modify the method of payment.

United States Constitution and Article 1 § 20 of the Michigan Constitution guarantees a criminal defendant the right to have effective assistance of counsel. People v Garcia, 398 Mich 250; 247 NW2d 547(1976); Strickland v Washington, 466 US 688; 101 S Ct 2052; 80 L Ed 26 (1984). When a criminal defendant in this state seeks to establish that he was denied effective assistance of counsel, the claim may be established by using the bifurcated standard formulated in either Strickland or Garcia.

In Garcia, supra, our Michigan Supreme Court held that a defendant establishes a prima facie case of ineffective assistance of counsel when he or she demonstrates:

> "defense counsel did not perform at least as well as a lawyer with ordinary training and skill in criminal law, conscientiously protecting his client's interest undeflected by conflicting considerations. [Secondly,] defendant must show that counsel made a serious mistake without which would have had a reasonably likely chance of acquittal." Garcia, supra at 264-266.

Under the federal test, the United States Supreme Court held that a defendant establishes a prima facie case of ineffective assistance of counsel when he or she demonstrates:

> "First, defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant a fair trial." Strickland, supra at 693.

A close reading of both standards demonstrates that there is little or no difference between the two. People v Jackson, 179 Mich App 344, 348; 445 NW2d 513 (1989). Both standards presume effective assistance of counsel and both require defendants to overcome the presumption by showing deficient and unreasonably conduct and resulting prejudice.

Defendant lists a number of alleged witnesses whom he insists could have testified as to how the victim received bruises on her neck and arm or could have testified regarding the defendant's relationship with the deceased and his character.

However, a comprehensive review of the record reveals that counsel performed at least as well as an attorney with ordinary training and skill in criminal law and conscientiously protected his clients interests, undeflected by conflicting considerations.

Further this court finds that defense counsel did not make a serious mistake but for which the defendant

would have had a reasonably likely chance of acquittal. This court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, particularly where the presentation of witnesses would only have illicited inadmissible hearsay testimony. People v Whalen, 129 Mich App 732; 342 NW2d 917 (1983). This court finds no basis upon which to order that a testimonial record be made pursuant to People v Ginther, 390 Mich 436; 212 NW2d 922 (1973) or to hold that defense counsel was ineffective.

Furthermore, with regard to appellate counsel, the court finds that the proper remedy for ineffective assistance of appellate counsel is to grant a new appeal. People v Percy, 127 Mich App 1; 338 NW2d 398 (1983); People v Oster, 97 Mich App 122; 294 NW2d 253 (1980) lv den 411 Mich 920 (1981). Consequently this court lacks the authority to grant such relief even if it were to find appellate counsel ineffective, which it does not. Finally, defendant argues that the court should remand the case for a "cause and prejudice hearing" in light of Alcorn v Smith, 781 F 2d 58 (6th Cir K4 1986). In Alcorn Id, the United States Court of Appeals granted defendant (petitioner) who sought habeas corpus relief a "cause and prejudice hearing" to determine whether his procedural default in state court was justified due to incompetence of counsel. This court having ruled that neither trial or appellate counsel was ineffective, finds that this case is

distinguishable, and that such a hearing is not necessary in this case.

For the reasons stated above defendant's motion is DENIED.

Dated: March 18, 1993

Gershwin A. Drain
Recorders Court Judge